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No.: _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

FRANCESCO GAMBINO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. The only "direct" evidence of petitioner's guilt in this case was the testimony of one witness that an alleged coconspirator said that he and another alleged coconspirator were "with" petitioner. The question presented by the admission of this testimony is as follows:

Did the district court deprive petitioner of due process of law and a fair trial by refusing to finally decide the admissibility of the alleged coconspirator hearsay prior to its admission and, instead, conditionally admitting the testimony and finally deciding admissibility only after the jury found petitioner guilty?[1]

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1. This case also presents i.e., two other, related issues: the quantum of "independent evidence" needed to cor-

(Footnote continued on following page)

2. Twelve days into the trial, Robert Reyers - a sitting co-defendant - disappeared from the defense table; shortly thereafter, he reappeared as a government witness and, over objection, was permitted to testify that he had pleaded guilty and that William Kane - the primary witness against petitioner - had told him of many of the incidents involving petitioner about which Kane had testified. Similarly, Joseph Cuffaro, an alleged coconspirator who pled guilty prior to the trial, testified for the prosecution both as to

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(Footnote continued from preceding page) roborate the alleged hearsay, and whether the independent evidence in this case satisfied that standard.

Petitioner respectfully contends that these issues are "subsidiary questions fairly included" in the "order of proof" issue. Rule 14.1. Accordingly, while no further reference will be made to those issues, they will be argued if certiorari is granted.

his guilty plea and as to events testified to by Kane.

In summation, the prosecutor - over objection - was permitted to argue that Cuffaro's and Reyers' guilty pleas both bolstered Kane's credibility and were substantive evidence of petitioner's guilt. Finally, the trial court refused defense counsel's request for an instruction to the jury that the guilty plea could only be used in re: the credibility of the person who pled guilty.

The foregoing presents the following questions:

a) whether a mistrial should have been declared or, at the least, adequate explanatory and cautionary instructions given to the jury, when Reyers left the trial?

b) whether Reyers should have been prohibited from testifying as a witness for the prosecution at this trial?

c) whether Reyers and Cuffaro should have been prohibited from testifying that they had pleaded guilty?

d) whether the prosecutor should have been prohibited from telling the jury that Reyers' and Cuffaro's guilty pleas could be considered as enhancing Kane's credibility and/or as substantive evidence of petitioners guilt?

And e) whether the trial court should have instructed the jury that Reyers' and Cuffaro's guilty pleas could only be considered re: their credibility?

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PRELIMINARY STATEMENT

Petitioner, Francesco Gambino, respectfully requests that a Writ of Certiorari be issued to review a judgment and opinion of the United States Court of Appeals for the Third Circuit entered in the above-captioned

proceeding on March 4, 1991.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of New York (Bechtle, J.), holding that a statement was admissible under the coconspirator exception to the hearsay rule is reported at 728 F. Supp. 1150, and is reprinted in the Appendix hereto at 1a. The opinion of the United States Court of Appeals for the Third Circuit affirming petitioner's conviction is reported at 904 F.2d 34 and is reprinted in the Appendix at p. 43a

JURISDICTION & TIMELINESS

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. Section 1254(1).

This petition is timely because filed within 90 days (plus extensions) of the

Court of Appeals' decision.

STATUTES & CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person shall be ... deprived of life, liberty, or property, without due process of law ...."

Federal Rules of Evidence, Rule 104(a):

> "Preliminary questions concerning ... the admissibility of evidence shall be determined by the Court ...."

Federal Rules of Evidence, Rule 801(d)(2)(E):

> "A statement is not hearsay if ... [t]he statement is offered against a party and is ... a statement by a coconspirator of a party during the course of and in furtherance of the conspiracy."

STATEMENT OF THE CASE

Petitioner was charged with conspiring to import and distribute

controlled substances (JA 31-7).[1] Based on pre-trial discovery, petitioner and his co-defendants became aware that the government intended to introduce a mass of alleged coconspirator hearsay, including testimony that an alleged coconspirator said that he and petitioner were in the same conspiracy. Accordingly, counsel sought a pre-trial hearing on the admissibility of this testimony, but the request was denied (JA 251-2, 287, 567).

At the trial William Kane testified that Anthony Mannino said that he and Simone Zito were "with" petitioner (Trial - hereafter "T" - 454).[2] The

1. Numerical references preceded by "JA" are to the Joint Appendix filed in the Court of Appeals.

2. The District Court described this testimony as "the most incriminating evidence against [petitioner]." United States v. Gambino, 728 F. Supp. 1150,

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trial court admitted this testimony "subject to conviction" and then ruled - after the jury had rendered a guilty verdict - that a sufficient conviction had been shown. United States v. Gambino, supra, 728 F. Supp. at 1155-8.

On appeal, petitioner contended that the trial court had erred in three ways: first, the trial court has failed to conduct a pre-admission proceeding concerning the alleged coconspirator hearsay; second, when the trial court made its post-verdict ruling on admissbility it used the wrong standard;

(Footnote continued from preceding page) 1154 (ED, Pa. 1989). The Court of Appeals characterized the testimony as "one of the most compelling pieces of evidence offered against [petitioner]." United States v. Gambino, 926 F.2d 1355, 1360 (3d Cir.1991). It was, in fact, the only "direct" evidence of petitioner's membership in the conspiracy offered during the entire 4600 page, 14-week, trial.

and third, the trial court erroneously found the hearsay had been sufficiently corroborated and was admissible (Brief for Appellant in Third Circuit, Docket No. 89-2087, at Point I, pp. 13-6). The Court of Appeals rejected all three arguments. United States v. Gambino, supra, 926 F.21d at 1360-2.

When the trial of this matter began, one Robert Reyers was a co-defendant who sat at the defense table alongside of petitioner (T. 1). After several weeks of trial, William Kane - the "government's most significant witness," United States v. Gambino, supra, 926 F.2d at 1257 - testified against Reyers; shortly thereafter, Reyers pled guilty, left the defense table, and, over objection became a prosecution witness. In particular - and over objection -

Reyers testified that Kane had told him of many of the incidents about which Kane himself had testified, including the conversation during which Anthony Mannino allegedly said that he and Simone Zito were "with" petitioner. Moreover - and, once again, over objection - the government told the jury in summation that Reyers had pled guilty because Kane had been telling the truth about him, and that that meant Kane was also telling the truth when he said that petitioner was a member of the conspiracy. Finally, the trial court refused to charge the jury that Reyers' guilty plea could not be considered either as enhancing Kane's credibility or as evidence of petitioner's guilt (T. 2098, 2100, 3334-5, 3511, 4107-9, 4456-7; 4478, 4481, 4523-8; JA 550-8).

On appeal, petitioner argued that he had been deprived of a fair trial by allowing Reyers to testify, by the prosecutor's summation, and by the trial court's refusal to charge as requested. (Brief for Appellant at Point III, pp. 39-51).

REASONS FOR GRANTING THE WRIT

POINT I

THIS CASE PRESENTS AN ISSUE LEFT OPEN IN BOURJAILY V. UNITED STATES, NAMELY, THE "ORDER OF PROOF" IN DETERMINING THE ADMISSIBILITY OF ALLEGED COCONSPIRATOR HEARSAY.

In Bourjaily v. United States, 483 U.S. 171 (1987) this Court resolved several issues relating to the admissibility of alleged coconspirator hearsay and held, inter alia, that the proponent of such testimony must establish by a preponderance of the evidence that the declarant and the person against whom the testimony was offered were both members of the same conspiracy. Id. at 176. However, the Court explicitly noted that "we do not express an opinion on the proper order of proof that trial courts should follow

in concluding that the preponderance standard has been satisfied .... " Id. at n. 1. This case presents this Court with an opportunity to express its opinion on this issue which has produced a wide diversity of opinion among the District and Circuit courts.

The Court of Appeals for the Third Circuit, in the instant case, permitted the trial judge to make no pre-admission findings, i.e., to admit the testimony conditionally and then to make a determination of admissibility after the jury had rendered its verdict. United States v. Gambino, supra, 926 F. 2d at 1360-61; see, also, United States v. Gambino, supra, 728 F. Supp. at 1151.[1]

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1. While the Court of Appeals noted that it had previously held that the order of proof is generally a matter of the trial judge's discretion (926 F. 2d at 1260)

(Footnote continued on following page)

Other Circuits have allowed conditional admissibility so long as a final determination is made either by the close of the prosecution case or the close of all of the evidence, i.e., before the case goes to the jury. See, e.g., United States v. Giovanelli, 747 F. Supp. 875, 879 (S.D.N.Y. 1989) (setting forth Second Circuit rule). However, even in those Circuits conditional admission has been labeled

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(Footnote continued from preceding page) two things must be noted about this general statement.

First of all, in none of the prior cases the Court of Appeals cited had the trial judge made a finding of admissibility after a jury verdict.

And, secondly, those cases had stated a general preference for pre-admission findings. See, e.g., In Re Fine Paper Antitrust Litigation, 685 F. 2d 810, 821 (3d Cir. 1982) ("We express ... our concern for the possible prejudice to conspiracy defendants that could result from conditional admission ... and we state ... that conditional admission should be used sparingly").

an "exception." United States v. Ferra, 900 F. 2d 1057, 1059 (7th Cir. 1990).

The majority of Circuits require the trial court to make a determination of admissibility at the time the evidence is offered at trial and before the jury even hears (much less considers) it. See, e.g., United States v. Troutman, 814 F. 2d 1428, 1447 (10th Cir. 1987); United States v. Miliet, 804 F. 2d 853, 856 (5th Cir. 1986); United States v. Holloway, 731 F. 2d 378, 381 (6th Cir. 1984). And see United States v. Ferra, supra.

Finally, in some Circuits the trial courts conduct pre-trial hearings at which admissibility is determined. See, e.g., United States v. Austin, 786 F. 2d 986, 990 (10th Cir. 1986); United States v. Andrus, 775 F. 2d 825, 835 (7th Cir.

1985).

The fact that this Court did not decide the "order of proof" issue in Bourjaily has been explicitly noted by Circuits attempting to divine whether their pre-Bourjaily decisions on this matter are still good law. United States v. Hernandez, 829 F. 2d 988, 994 (10th Cir. 1987).

It is petitioner's contention that this Court should rule that conditional admissibility is improper and that the admissibility of alleged coconspirator testimony must be finally determined - and either prior to or at the trial - before it is admitted.

There are several reasons why a final decision should precede admission of alleged coconspiracy hearsay testimony.

First of all, having conditionally

admitted the evidence, the trial court becomes committed - consciously or subconsciously - to subsequently holding that its prior ruling was correct. See, in general, ALDISERT, The Judicial Process (West. 1976) at 390, 396: "[E]ven with the most objective of decision makers ... there is always a risk that an initially acquired disposition will prevail over a later view." See, also, MALKAN, Retrospective Justification, 6 Touro L. Rev. 213 (1990).

Secondly, this commitment to retrospective justification of a ruling is strengthened where the conditionally admitted evidence is alleged coconspirator hearsay. That is so for two reasons: in many cases, as here, the alleged coconspirator hearsay is the

only (or, at least, the strongest) evidence against a defendant, and such evidence colors the non-hearsay testimony and makes it look more incriminating than it really is. Bourjaily v. United States, supra, 483 U.S. at 198 (Blackmun, J., dissenting) ("the [alleged coconspirator] statement will likely control the interpretation of whatever other evidence exists and could well transform a series of innocuous actions by a defendant into evidence that he was participating in a criminal conspiracy") (emphasis in original); MARCUS, Prosecution & Defense of Criminal Conspiracy Cases (Bender, 1988), Section 5.05(3) at 5-74: "The discretionary rule [permitting conditional admission of coconspirator hearsay] has been the subject of

particularly harsh criticism in recent times. The risk is that the hearsay declaration will bear on the decision of the judge ... in determining whether there was a conspiracy and whether the defendant was connected with the conspiracy."[2]

Finally, the pressure to adhere to the earlier ruling becomes irresistible because the alternative is unthinkable. If a trial court decides to reverse a prior decision of conditional admissibility the least it must do is instruct the jury to ignore the previ-

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2. It is petitioner's contention that this is precisely what occurred here. The trial court's opinion sustaining the admission of alleged coconspirator hearsay reveals that the court viewed ambiguous and/or innocent activity through the "lens" of the hearsay and transformed it into incriminating conduct. United States v. Gambino, supra, 728 F. Supp. at 1155-7.

ously admitted evidence - but that is usually considered insufficient to overcome the prejudice already suffered by the defendant. United States v. American Grain & Related Industries, 763 F. 2d 312, 319 (8th Cir. 1985). More often than not - and particularly in view of the highly incriminating nature of coconspirator hearsay - the trial court will have to declare a mistrial and/or dismiss the indictment. United States v. Lauga, 762 F. 2d 1288, 1291 (5th Cir. 1985). And where, as here, the trial court reverses itself only after a jury verdict, that verdict also has to be set aside. United States v. Austin, 786 F. 2d 986, 990 (10th Cir. 1986).

As then-Chief Judge Weinstein of the United States District Court for the

Eastern District of New York said in a related context:

> "After the case has been under way for some time, the judge is increasingly concerned about the possibility of a mistrial, which would require yet another extended period in tying up the court. Thus, as the trial develops, it becomes increasingly difficult for the court to view objectively the case and its evidentiary decisions without the added tension of avoiding errors that might result in a mistrial or reversal. The judge knows that the court cannot afford the time for retrial and he or she may be pressed to make decisions to avoid that eventuality, instead of deciding issues only as an informed trial judge's conscience mandates.
>
> It becomes increasingly doubtful whether a court so concerned with the need for avoiding a retrial and avoiding error can preside in a relaxed way completely unconcerned with the outcome and concentrating only on the due process that is requisite under our system of justice. The judge's ability to remain detached and objective is compromised. The option of a mistrial and a restarting of the case is almost closed when such a large expenditure of time and

> effort would be wasted." United States v. Gallo, 668 F. Supp. 736, 755 (E.D.N.Y. 1987), aff'd. 863 F. 2d 185 (2d Cir. 1988).

See, also, United States v. Biaggi, 909 F. 2d 662, 679 (2d Cir. 1990) (trial court should make final decision on Batson v. Kentucky claim before jury is sworn because "[p]ostponing consideration ... until the trial is in progress, or even completed, ... may create a subtle pressure to accept explanations of borderline plausibility to avoid the only relief then available, a new trial. Cf. United States v. Tunnessen, 763 F. 2d 74, 78 (2d Cir. 1985) ("requiring contemporaneous [finding] ... to guard against risk district judge 'may simply rationalize his action long after the fact')"). And see People v. Cheswick, N.Y.L.J.

5/30/91, p. 21, col. 3-4, p. 23, col. 5 (2d Dept.) (n.o.r.) ("as a general matter of policy, judges who preside over joint bench and jury trials should record their verdicts before learning of the result reached by the jury, in order to avoid any appearance of impropriety"); pp. 23-4 (dissent) ("Where the Trial Judge acts as the finder of fact as to one defendant at a trial of several defendants, one or more of which are tried before a jury, a procedure must be employed to ensure that his/her deliberations are not consciously or subconsciously influenced by the deliberations and verdict of the jury .... The possibility that the jury's verdict could either consciously or unconsciously influence the trial judge's verdict is particularly evident

from the facts of this case").

Petitioner does not quarrel with the general rule that judges are capable of making objective decisions. However, it has also been recognized that "there comes a point when we are unable to indulge in the comfortable fiction that judges can edit their thought processes to exclude that which is impermissible and include only that which is permissible." Hawkins v. LeFevre, 758 F. 2d 806, 878 (2d Cir. 1985). Where, as here, the issue is to whether evidence conditionally admitted was properly considered by a jury that heard many additional witnesses during a lengthy trial and has already rendered a verdict, that decision is always going to uphold the prior admission.[3] Put an-

3. That is why the cases previously
(Footnote continued on following page)

other way, "conditional" admissibility is a euphemism for what actually happens in the trial courts - once in, the testimony stays in.

Based on the foregoing, it is petitioner's contention that this Court should grant certiorari to answer the question left open in Bourjaily and to resolve the conflict among the Circuits as to the "order of proof" in determining the admissibility of alleged coconspirator hearsay, and should hold that a final decision must precede admission of alleged coconspirator hearsay. Cf. United States v. Bailey,

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(Footnote continued from preceding page) cited re: the options district courts have when they reverse findings of conditional admissibility were all appellate court decisions, i.e., counsel's research has not disclosed a single case where a district court changed its prior ruling.

444 U.S. 394, 416 (1979) (court may hold pre-admissibility hearing re: proferred testimony).

POINT II

IT IS IMPROPER TO PERMIT A SITTING CO-DEFENDANT TO PLEAD GUILTY AND TESTIFY AGAINST HIS FORMER CO-DEFENDANTS, AND TO ALLOW THE JURY TO CONSIDER THAT WITNESS'S GUILTY PLEA AS BOLSTERING THE TESTIMONY OF OTHER PROSECUTION WITNESSES AND AS SUBSTANTIVE EVIDENCE OF THE GUILT OF THE REMAINING DEFENDANTS.

This case presents several related issues that arise from a prosecution tactic that is being used with increasing frequency, i.e., calling an alleged coconspirator, eliciting the fact that he or she pled guilty to the same conspiracy then being tried, and then using that guilty plea both to bolster the credibility of other prosecution witnesses and as substantive evidence of the guilt of the defendants remaining on trial.

As a general rule a prosecution is

not permitted to elicit testimony that a coconspirator has pleaded guilty to. See, e.g., United States v. Griffin, 778 F.2d 707, 710 (11th Cir. 1985); Babb v. United States, 218 F.2d 538, 541 (5th Cir. 1955). Cf. Bridge v. Lynaugh, 838 F.2d 770, 773 (5th Cir. 1988) (not error to prevent defendant from introducing evidence of co-defendant's conviction because "A co-defendant's conviction and sentence for an offense arising out of the same course of events is irrelevant to the question of the defendant's guilt and thus not admissible"). This rule is based on the fact that such testimony has a great potential to be misused by the jury as proof of the guilt of the other alleged coconspirators. See, e.g., United States v. Austin, 786 F.2d 986, 991 (10th Cir. 1986). Such misuse,

of course, violates the "maxim" that "a defendant is entitled to have the questions of his guilt determined by the evidence against him, not on whether a Government witness or co-defendant has pled guilty to the same charge." United States v. Fleetwood, 528 F.2d 528, 532 (5th Cir. 1976).

To this general rule, the courts have admitted of only one exception, i.e., that the guilty plea of a coconspirator who is called as a witness may be elicited to blunt an attack on his or her credibility by showing that he or she was prosecuted and that the defendant was not unfairly singled out for prosecution. See, e.g., United States v. Casto, 889 F.2d 562, 567 (5th Cir. 1989). Even in this exceptional case, the potential for misuse by the

jury and prejudice to the defendant is so great that the trial court is required to instruct the jury - at least at the time this testimony is given and in its final instructions - that the evidence is to be used to assess the credibility only of that witness, and not as evidence of the credibility of any other witness or as substantive evidence of a defendant's guilt. See, e.g., Id. at 566-7 (limiting charge given at time of admission of testimony, at end of testimony of witness, and at end of trial); United States v. Halbert, 640 F.2d 1000, 1006 (9th Cir. 1981) ("The most effective practice would be to instruct the jury when the evidence of the plea is admitted, and again in final instructions").

While purporting to recognize the

foregoing, the Court of Appeals in this case expressly created a second exception and, it is petitioner's contention, impliedly created a third. These holdings represent a departure from established law both in the Third Circuit and in other Circuits, and presents this Court with an opportunity to address issues it has not previously discussed.

(a) As noted previously, Robert Reyers sat at the defense table for two weeks until, during the testimony of Kane, Reyers pled guilty and disappeared from the trial. Defense counsel moved for a mistrial on the ground that the jury would interpret Reyers' absence as evidence of Kane's credibility and the guilt of the remaining defendants; in the alternative, they moved to preclude

Reyers from testifying. Instead of taking either of these curative measures, the trial court gave the jury the unilluminating admonition "not to infer anything" from Reyers' absence.

First of all, it is petitioner's contention that on the facts of this case, i.e., where a sitting coconspirator disappears during the testimony of the primary government witness against both that coconspirator and those remaining in the trial, only a mistrial or, perhaps, preclusion of the testimony of that coconspirator, would allow the remaining defendants to receive a fair trial. See, e.g., United States v. Griffin, supra, 778 F.2d at 711 ("In a conspiracy trial, which by definition contemplates two or more culpable parties, courts must be

especially vigilant to ensure that defendants are not convicted on the theory that guilty 'birds of a feather are flocked together'; Krulewitch v. United States, 336 U.S. 440, 454 (1949) [Jackson, J., concurring]").

Secondly, the instruction given was woefully inadequate.

In United States v. Towns, 913 F.2d 434 (7th Cir. 1990) the Court of Appeals approved the following instruction:

> "Yesterday I informed you at the beginning of the jury selection process that each Defendant is entitled to separate consideration. In order to allow for separate consideration of each Defendant, we are going to proceed with the trial with regard to the Defendant Kenneth Towns. The cases of the other two Defendants who were present yesterday are to be considered at another time, and your sole consideration will be with regard to whether the Government has proven its case - at the end of the case - with regard to whether the Government has proven its

case beyond a reasonable doubt as to the Defendant Kenneth Towns." Id. at 443-4.

Similarly, in United States v. Phillips, 640 F.2d 87 (7th Cir. 1981), the following charge was found adequate:

> "Ladies and gentlemen of the jury, I'm going to give you a cautionary instruction in regard to the absence of [the defendant].
>
> One of the defendants who started this trial is no longer a part of the trial. For legally sufficient reasons, which I'm not going to go into at this time, he is no longer a part of this trial. I instruct you that is not and should not be of concern to you in dealing with the question of the guilt or innocence of [the remaining defendant]. And you are not to speculate as to the absence of or why the other defendant is no longer standing trial. And his absence should not control or influence your verdict in any way whatsoever with respect to the defendant who is still here.
>
> The reason for this is even when defendants are tried jointly, the jury is called upon to determine the guilt or the innocence of each defendant separately and the jury will be

called upon, even if they are joint defendants, to consider the evidence separately as to one defendant and then as to the next defendant. And that the purpose of a joint trial is not to implicate one defendant with the other, it's just a matter of convenience. It amounts to saving court time.

The fact that we have only one defendant left in this trial should be of no concern to you because whatever your verdict is, if you do reach a verdict, it has to be based solely upon the evidence that's received in this courtroom as it relates to that defendant.

I want to emphasize again that the remaining defendant has entered a plea of not guilty and he has therefore denied each and every essential element of the crimes charged. And that the government has a burden of proof beyond a reasonable doubt. This burden is still with the government and never shifts to the defendant." Id. at 90-1.

See, also, United States v. Barrientos, 758 F.2d 1152, 1155-6 (7th Cir. 1985) (collecting cases).

(b) Several days after Reyers

disappeared from the defense table he reappeared in the witness stand as a prosecution witness, admitted that he had pled guilty to the very charges that the remaining defendants were on trial for, and testified to a variety of the events that Kane testified to - including the alleged hearsay statement of Tony Mannino that he and Simone Zito were "with" petitioner (see Point I).

At this point, the trial judge had another opportunity to attempt to vitiate the prejudice inherent in Reyers' testimony; once again, however, the court failed.

Since the only legitimate purpose for the admission of Reyers' guilty plea was to allow the jury to assess Reyers' credibility, the jury should have been told that - and they should also have

been told that the guilty plea could not be used to assess Kane's credibility or as substantive evidence of petitioner's guilt. See, e.g., United States v. Casto, supra; United States v. Halbert, supra.

The failure of the trial court to give any instruction at the time Reyers testified was plain error. See, e.g., United States v. Harrell, 436 F.2d 606, 615 (6th Cir. 1970); Trussell v. United States, 278 F.2d 478, 480 (6th Cir. 1960).

(c) During summation and over objection, the prosecutor told the jury that they could consider Reyers' and Cuffaro's guilty pleas as bolstering Kane's credibility and as substantive

evidence of petitioner's guilt.[1]

As noted previously, the only exception to the general inadmissibility of guilty plea evidence is that the jury can use the plea to assess the credibility of the one who pled. Accordingly, it is reversible error for the prosecutor to tell the jury they may consider such pleas as bolstering the credibility of another witness. See, e.g., United States v. Eason, 920 F.2d 731, 735 (11th Cir. 1990) (reversible error to admit evidence of guilty plea of Harry Eason, Sr. re: credibility of Julian Rigby because "a conviction other than that of the witness himself is not admissible on the issue of the witness's

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1. Petitioner will focus on the misuse of Reyers' guilty plea in this presentation. However, if certiorari is granted, the issue of the misuse of Cuffaro's plea will also be argued.

credibility").

The Court of Appeals here approved the prosecutor's use of Reyers' plea as evidence of Kane's credibility on the ground that defense counsel had argued in summation that Reyers had expressed disbelief in Kane's veracity. See United States v. Gambino, supra, 926 F.2d at 1365. There are two answers to this.

In the first place, and as the Circuit recognized only counsel for co-defendant Fodera made this claim; counsel for petitioner merely attacked Kane's credibility based on Kane's prior record and internal inconsistencies within Kane's testimony. Id. at 1364-5. Accordingly, any "response" by the prosecutor was "invited" only by Fodera's counsel and had to be limited

to Fodera, and not to petitioner. See, in general, United States v. DiPasquale, 740 F.2d 1282, 1297 (3d Cir. 1984) (improper for prosecutor to "respond" to summation of one co-defendant by attacking other defendants). And see United States v. Halbert, supra, 640 F.2d at 1006.

Secondly, even if defense counsel had opened the door to some response to the argument that Reyers disbelieved Kane, that response had to be limited to Reyers' testimony as to facts and events that corroborated Kane, i.e., Reyers' guilty plea could not be advanced in support of that argument. See, e.g., United States v. Fleetwood, supra, 528 F.2d at 533-5.

(d) The Court of Appeals noted that, even if otherwise appropriate, the

prosecutor's references to the guilty plea would have been error if used as substantive evidence of petitioner's guilt. The Court held that this was not the case because "there was a direct nexus between Reyers' plea and the attack on Kane's credibility" and because the trial court "explicitly told the jury that the guilt of any person was not evidence of any other person's guilt." United States v. Gambino, supra, 926 F.2d at 1367.

While the nexus between Reyers' plea and Kane's credibility may have been clear to the Court of Appeals, there is no basis for assuming that the jury - the body that had to be aware of this nexus in order to not misuse the plea - was aware thereof. See, e.g., United States v. Gullo, 502 F.2d 759 (3d Cir.

1974) (proper focus for determining what summation meant is what reasonable juror would have thought it meant). As noted previously, neither at the time of Reyers' testimony about his plea nor at any other time had the jury been told that it could use Reyers' plea only as bolstering Kane's credibility.

Defense counsel asked the trial court to tell the jury that it could not use Reyers' plea as evidence of Kane's credibility, but the trial court did not do so. Of greater relevance here, the trial court did not take that opportunity to explicitly tell the jury it could use Reyers' plea for that purpose - but only for that purpose.

Furthermore, the fact that the jury was told, in the abstract, that the guilt of one person was not evidence of

the guilt of another, was not the equivalent of telling the jury that Reyers' plea could not be used as substantive evidence of petitioner's guilt.

This passing reference - which did not refer to Reyers' plea as an example, and which consisted of a single sentence in a lengthy charge - could not have alerted the jury to this problem. The Courts' of Appeal have insisted on explicit and repeated statements that guilty pleas are not evidence of a defendant's guilt; anything less will not suffice. See, e.g., United States v. Rewald, 889 F.2d 836, 865 (9th Cir. 1989). But, see, United States v. Fleetwood, supra, 528 F.2d at 536 ("We doubt that any instruction, had one been given, would have cured the prejudicial

impact of the testimony presented").

The problems that arise when a sitting co-defendant pleads guilty and then testifies against his former co-defendants are many and varied. They were aggravated here by the prosecutor's summation and the absence of instruction by the trial court. This Court should grant certiorari to address these issues.

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED, AND PETITIONER'S CONVICTION SHOULD BE SET ASIDE.

Respectfully submitted,

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APPENDICES

APPENDIX A
OPINION OF DISTRICT COURT

UNITED STATES of America

v.

Francesco GAMBINO.

Crim. No. 89-00003-01.

United States District Court,
E.D. Pennsylvania.

Nov. 9, 1989.

MEMORANDUM AND ORDER

BECHTLE, District Judge.

Presently before the court is the motion of defendant Francesco Gambino for judgment of acquittal pursuant to Fed.R.Crim.P. 29. For the reasons set forth herein, defendant's motion will be denied.

I. BACKGROUND

Defendant Francesco Gambino was in-

dicted on three counts of conspiracy to violate the federal narcotics laws. Count one charged a broad conspiracy to import multi-kilogram quantities of heroin from Sicily, Italy to the United States from in or about January 1984 to December 1, 1988 in violation of 21 U.S.C. Section 963. Count two charged a conspiracy to distribute the heroin during the same period in violation of 21 U.S.C. Section 846. Count three charged a conspiracy to distribute multi-kilogram quantities of cocaine from in or about January 1985 to December 1, 1988 in violation of 21 U.S.C. Section 846. Gambino was tried before a jury with six codefendants and

found guilty on counts one and two.[1]

At the close of the government's case, defendant Gambino made a motion under Fed.R.Crim.P. 29 for judgment of

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1. On January 3, 1989, the grand jury returned an eighteen defendant, twenty count indictment which charged defendant Gambino with the three conspiracy counts set forth above. The court severed the cases against defendants Filippo Filiberto, Salvatore DiMaio, Francesco Badalamenti, Antonio Romano, Salvatore Pilliteri and Frank Sciarrino and conducted a four week trial in April 1989. This trial resulted in convictions against all defendants on various counts, including count three charging the conspiracy to distribute cocaine. Since the court granted defendant Gambino's motion under Rule 29 as to count three, these convictions are irrelevant for purposes of this motion.

On June 5, 1989, the grand jury returned a superseding indictment adding defendant Domenico Mannino to counts one, two and three. On July 19, 1989, trial commenced against the seven remaining defendants (including Francesco Gambino) who had neither pled nor fled the country.

acquittal on all counts.[2] Defendant alleged that hearsay testimony provisionally admitted under the coconspirator declaration exception to the hearsay rule set forth in Fed.R.Evid. 801(d)(2)(E) was inadmissible since the government had failed to prove by a preponderance of the evidence that Gambino was a member of the conspiracies outlined in the indictment. Defendant further argued

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2. Fed.R.Crim.P. 29(a) provides, *inter alia*,:

> The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses ....

that if the hearsay declarations were inadmissible, the government lacked sufficient evidence to sustain a conviction. The court denied the motion without prejudice to renew at the close of all the evidence.

At the close of the evidence, defendant renewed his motion under Rule 29. The court granted the motion and entered judgment of acquittal on count three, but reserved ruling as to counts one and two until the post-verdict stage.[3] The case against Francesco

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3. This action is expressly permitted by Rule 29(b), which provides:

> If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

Gambino was then sent to the jury on counts one and two and a verdict of guilty was returned on both counts.[4] Defendant Gambino now moves the court to revisit his motion under Rule 29.

II. DISCUSSION

A. Admissibility of Coconspirator Declarations.

Federal Rule of Evidence 801(d)(2)(E) states, "A statement is not hearsay if ... [t]he statement is offered against a

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4. Defendants Ignazio Antonino Mannino, Emanuele Salvatore Mannino and Grace Pulitano Mannino were likewise convicted on counts one and two. Defendant Enzo Varisco was acquitted on count two and convicted on count three. Defendant Carlo Fodera was acquitted on counts two and three. Defendants Emanuele Salvatore Mannino and Grace Pulitano Mannino were also convicted for violating the money laundering statute, 18 U.S.C. Section 1956. Finally, defendant Robert Ryers pled guilty to count three during trial.

party and is ... a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Steeped in principles of agency law, the exception was rooted in the proposition that:

> When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made a "partnership in crime." What one does pursuant to their common purpose, all do, and as declarations may be such acts, they are competent against all.

Van Riper v. *United States*, 13 F.2d 961, 967 (2d Cir.), *cert. denied*, 273 U.S. 702, 47 S.Ct. 102, 71 L.Ed. 848 (1926) (L.Hand, J.), *quoted in*, 4 J. Weinstein & M. Berger, *Weinstein's Evidence* paragraph 801(d)(2)(E)[01], at 801-233 (1988). *See also United States* v. *Trowery*, 542 F.2d 623, 626-27 (3d Cir.

1976) (per curiam), *cert. denied*, 429 U.S. 1104, 97 S.Ct. 1132, 51 L.Ed.2d 555 (1977).

Prior to the enactment of the Federal Rules of Evidence in 1975, this coconspirator declaration exception to the hearsay rule required proof *aliunde*, or independent evidence apart from the hearsay statement itself, sufficient to establish that both the declarant and the defendant were members of the alleged conspiracy and that the statement was made in its course and in furtherance of its goals. *See Glasser* v. *United States*, 315 U.S. 60, 74, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942). The requirement of independent proof stood guard against the unbridled use of vicarious admissions in conspiracy

cases, lest the hearsay "lift itself by its own bootstraps to the level of competent evidence." *Glasser*, 315 U.S. at 75, 62 S.Ct. at 467. *See also United States* v. *Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

In *Bourjaily* v. *United States*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987) the Supreme Court found that the enactment of the Federal Rules of Evidence fundamentally changed the law in this area. After establishing that it is the province of the *court* to determine by a *preponderance of the evidence* whether the defendant and the declarant were members of the alleged conspiracy and whether the hearsay statement was made during its course and in furtherance of its goals, Chief Jus-

tice Rehnquist's opinion for the Court went on to hold that Federal Rules of Evidence 104(a)[5] and 1101(d)(1)[6] overruled *Glasser's* requirement of proof *aliunde* as a strict condition of admissibility. 107 S.Ct. at 2780-82. The Court stated that "Rule 104 ... allow[s] the court to make the prelimi-

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5. Federal Rule of Evidence 104(a) provides, *inter alia*,:

> Preliminary questions concerning the ... admissibility of evidence shall be determined by the court .... In making its determination it is not bound by the rules of evidence except those with respect to privileges.

6. Federal Rule of Evidence 1101(d)(1) provides: (d) Rules inapplicable. The rules (other than with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104.

nary factual determinations relevant to Rule 801(d)(2)(E) by considering *any* evidence it wishes, un-hindered by considerations of admissibility." 107 S.Ct. at 2780 (emphasis added).

The *Bourjaily* Court confronted *Glasser's* bootstrapping argument on two distinct levels. First, the Court stated that it was bound by conventional methods of statutory interpretation:

> It would be extraordinary to require legislative history to *confirm* the plain meaning of Rule 104. The Rule on its face allows the trial judge to consider any evidence whatsoever, bound only by the rules of privilege.

107 S.Ct. at 2780 (emphasis in original). Next, the Court explained the reasoning behind the rule:

> First, out-of-court statements are only *presumed* unreliable. The presumption may be rebutted by appropriate proof....

> Second, individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts.

Id. at 2781 (emphasis in original).

The important question left unanswered by *Bourjaily* is the extent to which hearsay statements may provide the sole inculpation of a defendant in a conspiracy for purposes of admissibility under 801(d)(2)(E). *Bourjaily*, 107 S.Ct. at 2781-82 ("We need not decide in this case whether the courts below could have relied solely upon [] hearsay statements to determine that a conspiracy had been established by a preponderance of the evidence."). Although this inquiry is technically unnecessary since the court finds that

the "sum of the evidentiary presentation" was sufficient to meet the preponderance standard, the court believes that the incriminating nature of the hearsay statements in this case warrants further discussion of this topic.

Prior to *Bourjaily*, the Third Circuit had joined the majority of Courts of Appeals in holding that Rule 104 had not supplanted *Glasser's* requirement of proof *aliunde*. *See United States* v. *Ammar*, 714 F. 2d 238, 245-7 & n. 3 (3d Cir.), *cert. denied*, 464 U.S. 936, 104 S.Ct. 344, 78 L.Ed.2d 311 (1983); *United States* v. *Continental Group, Inc.*, 603 F.2d 444, 457 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032, 100 S.Ct. 703, 62

L.Ed.2d 668 (1980).[7] Rather, the court was persuaded that *Glasser's* boot-strapping rationale continued to require a "clear preponderance of evidence independent of the hearsay statement to satisfy the judge that the declarant was a participant [in the conspiracy]." *Trowery, supra,* 542 F.2d

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7. From the court's discussion in *Ammar,* it appears that only the Sixth Circuit anticipated the Supreme Court's holding in *Bourjaily.* 714 F. 2d at 246 n. 3, *citing, United States* v. *Vinson,* 606 F.2d 149, 153 (6th Cir.1979), *cert. denied,* 444 U.S. 1074, 100 S.Ct. 1020, 62 L.Ed.2d 756 (1980). However, the First Circuit's decision in *United States* v. *Martorano,* 561 F.2d 406, 408 (1st Cir.1977), *cert. denied,* 435 U.S. 922, 98 S.Ct. 1484, 55 L.Ed.2d 515 (1978) similarly called *Glasser's "vitality"* into question. *See* Note, *Bourjaily* v. *United States: A New Rule for Admitting Coconspirator Hearsay Statements under Federal Rule of Evidence 801(d)(2)(E)* 1988 Wisc.L.Rev. 577, 582-83.

at 627. This court has found no Third Circuit authority discussing whether *Bourjaily* permits district courts to rely exclusively on the hearsay statements themselves to determine their admissibility, or, in the alternative, the degree to which the hearsay must be corroborated by independent evidence sufficient to satisfy the sum of the evidentiary presentation.[8] Other circuits have required corroborative evidence, *United States* v. *Dworken,* 855 F.2d 12, 25 (1st Cir.1988), *cert. denied,* ____ U.S. ____, 109 S.Ct. 66,

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8. In *United States* v. *Levy,* 865 F.2d 551 (3d Cir.1989), the Third Circuit noted that *Bourjaily* had changed the *Ammar* standard, but found disposition of the issue unnecessary since the independent evidence before the court was sufficient to satisfy the higher evidentiary burden under *Ammar. Id.* at 553.

102 L.Ed.2d 43 (1988); *United States* v. *Leavis,* 853 F.2d 215, 219-20 (4th Cir.1988); *United States* v. *Zambrana,* 841 F.2d 1320, 1343-47 (7th Cir.1988); *United States* v. *Garbett,* 867 F.2d 1132, 1134 (8th Cir.1989); *United States* v. *Gordon,* 844 F.2d 1397, 1402 (9th Cir.1988), and such a conclusion was certainly envisioned by the *Bourjaily* court itself. As explained by Justice Stevens in his concurrence:

> An otherwise inadmissible hearsay statement cannot provide the sole evidentiary support for its own admissibility - it cannot lift itself into admissibility entirely by tugging on its own bootstraps. It may, however, use its own bootstraps, together with other support, to overcome the objection.... This interpretation of *Glasser* as requiring some but not complete proof *"aliunde,"* is fully consistent with the plain language of Rule 104(a).

107 S.Ct. at 2783-84 (footnotes omitted).

This court finds the logic of Justice Stevens' concurrence compelling. Taken in conjunction with decisions in other circuits and prior Third Circuit jurisprudence in this area, as expressed in *Ammar,* the court finds that federal law mandates the coconspirator hearsay statements be corroborated by some independent evidence before they can be admitted under Fed.R.Evid. 8801(d)(2)(E). This, however, does not end the inquiry. Since the sum of any evidentiary presentation is, by definition, *sui generis,* the quantum of independent evidence necessary to meet the preponderance standard is not subject to a precise calculus. Conse-

quently, the court must evaluate all the relevant evidence in this case to determine if the standard has been met.

B. The Evidence Against Francesco Gambino

To understand the evidence against Francesco Gambino, a brief overview of the government's case is required. The indictment charged defendant Gambino with being a ranking member in the Sicilian Mafia who supervised the importation of heroin from Italy and its subsequent distribution throughout the New York/New Jersey/Pennsylvania area during January 1985 to December 1988. The *modus operandi* of the importation scheme, as described by government witness Salvatore Allegra, consisted of the use of couriers who would conceal

heroin on their person in Sicily and transport it to its entrepot, New York, via international commercial flights. The couriers would be met in New York by a member of the conspiracy who would take the heroin and provide the couriers with cash payments. The cash was then transmitted to the heroin's Sicilian sources through the couriers' return flight.[9]

Allegra testified that in early 1985

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9. The indictment alleged that large quantities of cocaine were eventually shipped to Sicily from South America and the Caribbean as barter for the imported heroin. The government introduced evidence of a Colombian cocaine shipment in excess of 500 kilograms which left Aruba by freighter and rendezvoused with a fishing boat off the coast of Sicily some time in January of 1986. The evidence suggests that this shipment was paid in cash, and not as barter; however, testimony indicated that such barter transactions were contemplated for future shipments.

he was recruited for this operation by Tommaso Scalici, who eventually introduced him to the operation's immediate supervisor, Simone Zito - an indicted coconspirator and fugitive from justice. Zito initially oversaw the operation in Sicily but then moved to the receiving end in the United States, where he teamed up with defendant Ignazio Antonio "Tony" Mannino. The evidence at trial showed that Simone Zito and Tony Mannino continued to both coordinate the importation and arrange the distribution of heroin from their residences in Pennsylvania through the end of 1988.

To avoid detection by law enforce-

ment,[10] Zito and Mannino used pay telephones to communicate with coconspirators. Specific public phones between Pennsylvania and New York were designated through coded conversations. The government alleged, and the jury found, that the conspirators used the Mannino residence as an information clearing house. Coconspirators would call the Mannino residence and be given information as to times and locations where Tony Mannino and Simone Zito could be contacted.

The jury also found that Simone Zito and Tony Mannino worked for Francesco Gambino. The evidence showed that Zito

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10. The telephones at the residences of Simone Zito and Tony Mannino were wiretapped intermittently pursuant to court order.

and Mannino would travel to the Cafe Giardino in Brooklyn, New York on an almost daily basis. Government witness William Kane testified that he was present at the Cafe daily between 1986 and 1988 and that he observed Francesco Gambino there on numerous occasions. The government contends that Zito and Mannino met with Gambino in and around the Cafe Giardino to discuss their narcotics trafficking and to receive further instructions. To support these allegations, the government offered both independent evidence and the hearsay statements of cooperating witnesses which are the subject of this motion.

Clearly the most incriminating evidence against Gambino was a hearsay statement by Tony Mannino to government

witness William Kane during their negotiations over the sale of heroin. Kane testified that in October of 1987 Simone Zito had approached him about a $25,000 loan which Zito needed for a downpayment on a townhouse in Pennsylvania. Kane stated that he would lend Zito the money if he would post a kilogram of poor quality heroin, which the two had been bargaining over, as collateral. Zito agreed.

On October 21, 1987, Kane met Zito at a diner in Cherry Hill, New Jersey. Kane testified that upon entering the diner, Zito stuffed a brown paper bag containing the heroin into Kane's pocket. The two proceeded to the men's room where they searched each other for concealed recording devices. Kane then

told Zito that he did not bring the cash and that he was angry because he believed Zito had him followed and he was not used to such abrupt treatment. The two then agreed to meet the next day to exchange the cash.

On October 22, 1987, Kane met Zito at the same New Jersey diner. The two once again entered the men's room and exchanged the cash. Also present at the diner was defendant Tony Mannino. After a brief argument over the price of the sale, Kane and Mannino discussed their operations. Kane told Mannino that he worked for Giuseppe Gambino, the owner of the Cafe Giardino, and that he had extensive cocaine connections in Florida. Kane testified that Mannino responded that he and Zito were "with

'Cheech' [Francesco] Gambino."[11]

Under the pre-*Bourjaily* standard, this extremely incriminating hearsay

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11. Gambino's counsel vigorously objected to the introduction of this testimony at trial. He argued that the official Federal Bureau of Investigation report, commonly known as an FD-302, summarizing the case agents debriefing of Kane after this meeting did not make reference to this hearsay statement. Indeed, an FD-302 of July 17, 1989 summarizing a pretrial interview with Kane indicates that the government attorney first became aware of this statement during this July 17 interview. The government attorney noted this error to the agents, who were present during both the October 22 and July 17 debriefings, and directed them to file a supplemental report to include the statement by Mannino. Defense counsel argues that this unusual sequence of events proves that Kane's testimony in this regard was perjured and therefore inadmissible. The court does not agree. To the extent that Rule 104 and *Bourjaily* requires the court to make initial findings of fact, the court believes that Kane's testimony is credible for purposes of admissibility under Rule 801(d)(2)(E) and should be weighed by the jury.

statement by a conspirator linking a fellow defendant to the conspiracy would be irrelevant in determining its own admissibility under Rule 801(d)(2)(E). Under the liberal interpretation of *Bourjaily*, this statement could be sufficient by itself to permit its admission to the jury. The court believes that this latter interpretation of *Bourjaily* would be the logical equivalent of the Queen of Hearts call for "sentence first - verdict afterwards." L. Carroll, *Alice's Adventures in Wonderland* (Oxford University Press 1983), at 165. Moreover, it would usurp the screening function of the court and encourage the manufacture of testimony in criminal conspiracy cases. The better view

requires the government to present independent evidence which corroborates the hearsay's inference that a defendant was a coconspirator of the hearsay declarant. In this case the government's evidence met this burden.

First, the government offered a series of F.B.I. surveillance photographs showing Gambino in the presence of coconspirators during the period of the conspiracy. The government concedes that none of the photographs depict criminal activity. Instead, they were offered to prove association between Gambino and fellow conspirators. It is black letter law that mere association cannot alone support a conspiracy conviction. "On the other hand, the timing and

circumstances of a meeting or series of meetings may be sufficiently suspicious to permit a reasonable inference of complicity in the criminal enterprise." *Ammar, supra,* 714 F.2d at 250 (citations omitted).

The majority of the photographs showed Gambino socializing with friends and relatives in the Sicilian community and therefore are of minor evidentiary value. However, others showed Gambino in the presence of Tony Mannino and Simone Zito during key periods of the conspiracy. Although Gambino and Mannino are related by marriage and were frequently seen in each other's company, the surreptitious conduct charged in this case necessarily permits the jury to draw reasonable inferences as to whe-

ther these meetings were truly social or were subterfuge designed to obscure illicit conduct. Thus, taken as a whole, the court finds that the surveillance photographs are probative independent evidence of Francesco Gambino's membership in the conspiracies charged in counts one and two of the indictment and were properly submitted to the jury.

Second, the government offered into evidence transcripts of intercepted telephone conversations between defendant Gambino, Tony Mannino and Tony's wife, Grace Pulitano Mannino.[12]

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12. These conversations took place in Sicilian and, therefore, were not played for the jury. Instead, they were read by script readers from transcripts translated and prepared by the government. The court believes that

(Footnote continued on following page)

The content of these conversations invariably centered on when Tony Mannino would be arriving in Brooklyn. Often, Tony Mannino was not home and Grace Mannino passed on information as to his whereabouts. The government contends that the curt and disjunctive nature of these conversations indicate that the parties were using coded messages to arrange meetings without detection, while defendants attribute this to the vagaries of translation from Sicilian to the English language.

In either case, the conversations are

(Footnote continued from preceding page) this method of communicating this particular evidence to the jury was straightforward and non-prejudicial, and the extent to which defendants object to this procedure, such motion is denied pursuant to the Third Circuit's decision in *United States* v. *Theodoropoulos*, 866 F.2d 587 (3d Cir.1989).

of the same probative value as the surveillance photographs discussed above and, in several instances, confirm meetings in Brooklyn which were the subject of those photographs. Once again, a telephone call to a Pennsylvania relative or acquaintance to arrange a meeting in Brooklyn, New York, despite its unusual frequency, is of minimal evidentiary value and is certainly insufficient to create proof *aliunde* of a conspiracy. However, the court does find that this evidence corroborates Mannino's hearsay statement to Kane and supports other evidence of Gambino's role in the conspiracy. It is therefore properly included in the evidentiary melange which the court may consider under *Bourjaily*.

Third, the government presented the testimony of Robert Ryers. Ryers was originally a defendant in this case. During the course of the trial, he pled guilty to count three and later testified on behalf of the government. Ryers, the finance manager of a New Jersey car dealership, testified that during the summer of 1987 he became involved with Simone Zito through William Kane, who had been a customer of the dealership since 1986. Kane was then negotiating with Simone Zito and Tony Mannino for the purchase of heroin. In an attempt to further ingratiate himself with Zito, Kane approached Ryers about financing Zito's purchase of a Mercedes-Benz automobile. After reviewing Zito's finances, Ryers agreed

to assist in sheltering Zito's drug profits by placing him on the payroll of Kane's vending machine company. The three had numerous meetings through the end of 1988 during which time Zito informed Ryers of the scope of his narcotics trafficking operations.

Ryers provided one additional link in the chain conspiracy which implicates Francesco Gambino. Throughout 1987 and into early 1988, Ryers began to inform Kane of an ongoing grand jury investigation into international narcotics trafficking being conducted in the Eastern District of Pennsylvania. Ryers obtained this secret information through his wife, who was the court reporter for the grand jury. Ryers warned Kane, and later Zito, that the

government's investigation seemed to be focusing on their activities and that he was privy to further developments. Ryers testified that, in response to this information, Zito handed him a list containing four names: Simone Zito, Ignazio Mannino, Domenic Mannino and Francesco Gambino. Zito told Ryers that if any of these names came up in the grand jury he was to inform Zito immediately.

Although the government was unable to offer the list at trial, the testimony of Ryers is nonetheless independent circumstantial evidence of Gambino's membership in the conspiracy. Ryers' testimony regarding his disclosure of confidential grand jury matters and the circumstances under which he received

the list is nonhearsay testimony which is admissible against Gambino as probative evidence of his involvement with Simone Zito and Tony Mannino in the very conspiracies giving rise to the indictment in this case.

Fourth, the government presented the testimony of Filippo Ricupa, an unindicted coconspirator in counts two and three of the indictment. Ricupa came to the United States from Italy in 1966 and became a barber in the Brooklyn area. In exchange for a payment of gambling debts, Ricupa took three trips to Italy between 1975 and 1979 with one Filippo Ragusa. On each trip, Ricupa concealed large sums of currency ranging up to $150,000. On his last trip in 1979, Ricupa testified that he smuggled

heroin into the United States.

By 1983 Ricupa began distributing heroin. His major source of supply was Salvatore DiMaggio, who had been introduced to Ricupa through Filippo Ragusa. Ricupa testified that DiMaggio would give him kilogram quantities of heroin on consignment for approximately $195,000 per kilogram. Ricupa would distribute the heroin to his sources and repay DiMaggio after his sources made their sales. Ricupa's major customer for this heroin was Ricky Santiago.

Ricupa testified that in the summer of 1985, he received a telephone call from DiMaggio directing him to collect all the money he could locate for an emergency shipment to Sicily. After some recalcitrance, Ricupa obtained

approximately $100,000 from Santiago and brought it to DiMaggio's Brooklyn restaurant. Ricupa stated that he handed the cash to DiMaggio in two small brown paper bags. DiMaggio took the money and went upstairs. He returned several minutes later with one large brown shopping bag and placed it in the back of an automobile waiting in front of the restaurant. Ricupa testified that he recognized the man in the automobile to be Francesco Gambino, a customer in his barbershop.[13] The court

13. Defense counsel objected to this testimony of Ricupa on the grounds that it was inadmissible hearsay since Ricupa had, at one point, stated that DiMaggio told him it was Gambino and that he had not recognized him directly. Ricupa, who testified through a Sicilian interpreter, was certainly inconsistent on this point. However, insofar as

(Footnote continued on following page)

finds that this testimony corroborates Mannino's hearsay statement and Gambino's role in the conspiracy.

Lastly, William Kane testified that he met with Simone Zito at the Cafe Giardino in March of 1988. At that meeting, Kane stated that Zito offered him a kilogram of purer quality heroin for $190,000. When Kane countered with a $150,000 offer, Zito went to the back of the room to get approval. Zito then told Kane that the price was negotiable and that he would obtain a sample of the heroin to give to Kane. Although Kane admitted that he could not see who Zito

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(Footnote continued from preceding page) Ricupa's testimony could be characterized as hearsay, the court finds that it was sufficiently corroborated by the independent evidence in this case and was, accordingly, admissible.

spoke with, he testified that a reconnoiter of the cafe revealed that Francesco Gambino was the only nonemployee present at the time. Kane thus concluded that Zito was reporting to Gambino about the terms of their drug deal. The court finds this to be independent corroborative evidence of Gambino's membership in the conspiracy.

A cumulative review of this evidence against Francesco Gambino placed in its proper evidentiary context corroborates the hearsay statement by defendant Tony Mannino and makes the existence of defendant Gambino's membership in the conspiracies set forth in counts one and two of the indictment "more probable than its nonexistence," *see United States* v. *Trotter,* 529 F.2d 806, 812 n.

8 (3d Cir.1976). Since the requirements of *Bourjaily* have been met, the evidence was properly submitted to the jury.

III. CONCLUSION

In sum, the United States Supreme Court's decision in *Bourjaily* v. *United States,* 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987) permits district courts to consider hearsay declarations themselves in determining whether the government has established by a preponderance of the evidence that a defendant is a member of the alleged conspiracy for purposes of admissibility under Fed.R.Evid. 801(d)(2)(E). However, this court follows the majority of circuit courts which interpret the *Bourjaily* holding as requiring some independent corroborative evidence of a

defendant's conspiratorial conduct before the coconspirator hearsay can satisfy the preponderance standard. In this case, the court finds that the direct testimony of William Kane, Robert Ryers and Filippo Ricupa, coupled with the government's surveillance photographs and transcripts of intercepted telephone conversations, corroborates coconspirator Ignazio Antonino Mannino's statement that he was working with defendant Gambino and establishes by a preponderance of the evidence that Francesco Gambino was a member of the conspiracies outlined in counts one and two of the indictment. This sum of the government's evidentiary presentation was properly sent to the jury. Gambino's motion for judgment of

acquittal pursuant to Fed.R.Crim.P. 29 is, accordingly, denied.

OPINION OF UNITED STATES COURT OF APPEALS

UNITED STATES of America,

v.

Francesco GAMBINO, Appellant in No. 89-2087,

United States Court of Appeals, Third Circuit.

Argued Sept. 17, 1990.

Decided March 4, 1991.

Before SCIRICA, ALDISERT and HIGGINBOTHAM,* Circuit Judges.

OPINION OF THE COURT

SCIRICA, Circuit Judge.

Defendants appeal their jury convictions of conspiracy to import and distribute heroin (21 U.S.C. Sections 963, 846) and money laundering (18

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* Since the date of argument Judge Higginbotham has assumed senior status.

U.S.C. Section 1956(a)(1)). We will affirm.

I.

Francesco Gambino supervised the importation and distribution of heroin from Italy to the New York-New Jersey area from 1985 to 1988. The scheme was coordinated by Antonio ("Tony") Mannino and Simone Zito, with assistance from Tony Mannino's brother Salvatore ("Sal") Mannino, Tony Mannino's wife Grace Mannino, and Simone Zito's brother Stefano Zito. Enzo Varisco was one of the conspiracy's cocaine distributors.[1]

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1. Francesco Gambino, Tony Mannino, Sal Mannino, and Grace Mannino were convicted of conspiring to import and distribute heroin (21 U.S.C. Sections 963, 846), Sal and Grace Mannino were convicted of money laundering (18 U.S.C. Section 1956(a)(1)), and Enzo Varisco was convicted of conspiring to distribute cocaine (21 U.S.C. Section 846).

Before addressing defendants' contentions, it is necessary to recite the facts in some detail and in particular the background and role of William Kane, an FBI informant and the government's most significant witness. Kane ran an illegal video poker business in New York City with Giuseppe "Joe" Gambino, and operated out of the Cafe Giardino in Brooklyn, owned by Joe Gambino. Through his illegal business, Kane became involved with the defendants in this case.

In October 1986, however, Kane became a confidential informant for the FBI. In 1986 and 1987, Kane was introduced to Simone Zito and Tony Mannino, and later to Simone Zito's brother, Stefano Zito. Stefano Zito and Kane became friends.

In 1987, Stefano told Kane that he, his brother Simone Zito, and Tony Mannino were members of the Mafia and that they were importing heroin into the United States. Stefano told Kane that Tony's brother Sal Mannino was then in Sicily, arranging for an exchange of heroin for cocaine. FBI interceptions of telephone conversations confirmed that Sal Mannino was in Sicily at the time.

Working with the FBI, Kane began to participate in the conspirators' illegal activities. Because neither Simone nor Stefano Zito had any legitimate source of income, Kane carried them on the payroll of his video game company and arranged financing for their automobiles. Kane soon moved on to more direct involvement in the conspiracy.

In October, 1987, Simone Zito told Kane that he wanted to purchase a townhouse, as an investment and as a place to cut heroin, but that all his money was tied up in heroin. After first discussing a possible loan, Simone agreed, in a tape-recorded conversation, to sell Kane seven ounces of heroin for $25,000. That conversation also revealed some of the details of Simone Zito's relationship with Tony Mannino. Kane mentioned that he did not want anyone to know about the transaction, not even Tony Mannino. Zito responded that "me and Tony's the same person."

Simone Zito delivered the heroin to Kane later that evening. The next day, Kane paid Simone Zito the $25,000. Tony Mannino accompanied Zito to that

meeting, and afterwards Kane, Mannino and Zito discussed further heroin sales. In the course of these discussions, Kane mentioned that his boss in the drug trade was Joe Gambino. Mannino responded that his and Simone Zito's boss in the drug trade was Francesco Gambino.

On several other occasions, Simone Zito and Kane discussed further heroin transactions both in recorded and unrecorded conversations. In March or April 1988, the two had a conversation in the Cafe Giardino which significantly corroborated Mannino's earlier statement that he and Simone Zito worked for Francesco Gambino. Zito offered to sell Kane a kilogram of heroin on the spot. Kane, who was not able to purchase drugs without FBI authorization but did not

want to seem disinterested, countered with a much lower offer. At that point, Simone Zito walked to the rear of the cafe, out of Kane's sight, then returned with the information that the price was negotiable, and that Kane could take a sample home to New Jersey. Shortly afterward, Kane determined that the only two people in the cafe, other then himself and Simone Zito, were Francesco Gambino and a bartender.

The government also presented evidence of the workings of the heroin importation scheme. Several members of the conspiracy who were indicted with defendants pled guilty and testified for the government. Salvatore Allegra testified that in 1985, he was asked by Tommaso Scalici to hire couriers to

smuggle heroin into the United States. Supervised by Simone Zito, Allegra arranged for couriers who traveled to the United States from Sicily with packages of heroin hidden on their bodies. In the United States, the heroin was delivered to Salvatore Caruso, an associate of Francesco Gambino. Allegra oversaw several deliveries before he was arrested by Italian authorities in 1986.

Tony Mannino and Simone Zito also sought Kane's assistance in their cocaine distribution scheme. Salvatore Rina, a friend of Kane's who lived in Florida, had access to large amounts of cocaine. Mannino and Zito wanted Kane's

help in obtaining cocaine from Rina.[2]

Timothy Zepp, another FBI informant, also testified about the conspiracy's involvement in the cocaine trade. According to Zepp, Zito sold cocaine to Enzo Varisco. Zepp was one of Varisco's customers. On one occasion, Zepp arrived at Varisco's pizzeria to pick up a cocaine delivery. Because the cocaine had not yet arrived, Varisco told Zepp to wait. Soon Simone Zito arrived, carrying a bag. After Simone and Varisco went briefly to a back room, Varisco handed Zepp his cocaine. In a later conversation with Zepp, Simone Zito revealed that he knew the price Varisco charged for the cocaine, and of-

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2. The record does not reveal whether this contemplated transaction ever took place.

fered Zepp a better price.

Grace Mannino, Tony Mannino's wife, was also involved. Because Tony Mannino knew that his telephone was being tapped, the conspirators devised an elaborate system of arranging for calls to and from various public pay telephones to conduct their drug trade. Typically a conspirator would call Grace Mannino and arrange for a telephone call to the "attorney's office" at a particular time. At the specified time, Simone Zito or Tony Mannino would be observed by government agents picking up a pay telephone.

Many of the telephone calls by conspirators to the Mannino residence were in halting, guarded code. For example, on January 5, 1988, Grace

Mannino told Giovanni Angelo Mannino, Tony Mannino's brother, to call her husband Tony "at the same place as two days ago." Later that day, Simone Zito called the Mannino residence and told Sal Mannino to "call your brother ... not at that place where you went two days ago ... the one before ... be careful at what you are doing." Calls that were not so cryptic explained when Tony Mannino would arrive in Brooklyn for his frequent meetings with Francesco Gambino.

The conspirators laundered their proceeds. In 1987, Tony Mannino, Sal Mannino, Grace Mannino, and Simone Zito purchased a house to shelter their drug profits. As we have noted, in October, 1987, Simone Zito told Kane that he

needed money to buy a townhouse both as an investment and as a place to cut heroin. The day after Kane delivered the $25,000 to Simone Zito and Tony Mannino, $16,000 in cash was deposited in the bank account of SNT corporation, the corporate name of a pizzeria owned and operated by the Manninos. Like the money that Kane handed Simone, the deposit contained a large number of one hundred dollar bills. The government presented evidence at trial suggesting that the remaining $9,000 was paid into the account over the next several weeks.

Two other incidents corroborate Francesco Gambino's role in the conspiracy. As we have noted, Kane helped Stefano and Simone Zito obtain automobiles. Kane made these arrange-

ments through Robert Reyers, who was an automobile dealer in southern New Jersey. Through these transactions, Reyers became familiar with Stefano and Simone Zito, Tony Mannino, and Enzo Varisco. Reyers testified as a witness for the government at trial. In January, 1988, Robert Reyers told Kane, Simone Zito and Tony Mannino that Reyers' wife, a court reporter in the federal courthouse in Philadelphia, could obtain names that came before a federal grand jury sitting in the Eastern District of Pennsylvania. Soon afterwards, Simone Zito gave Reyers a list of four names, with instructions to contact him immediately if any of the names came up in connection with the grand jury. Those names were Simone

Zito, Tony Mannino, Domenico Mannino, and Francesco Gambino.

The second incident was recounted by Simone Ricupa, a former heroin dealer in New York City. One day in 1985, Ricupa was told by his supplier, Sal DiMaggio, that DiMaggio's supplier needed as much money as possible to send to Italy as soon as possible. Ricupa gathered about $100,000 from some of his dealers, placed it in a paper bag and, as instructed, delivered the money to DiMaggio's restaurant. When he arrived at the restaurant, Ricupa saw Francesco Gambino sitting in a car parked near the restaurant. Ricupa and DiMaggio went into the restaurant and DiMaggio went to an apartment upstairs. While waiting, Ricupa could see Gambino from his

vantage point in the restaurant. DiMaggio returned downstairs with two large shopping bags, which he carried out to Gambino's car. After a quick discussion with Gambino, DiMaggio placed the bags in the car, and Gambino drove away.

On July 26, 1988, the FBI searched an apartment in Brooklyn, New York that was rented in the name of Salvatore Inzerillo. Prior to this search, Inzerillo, Simone Zito, and Tony Mannino had been seen going to and from the apartment. The search turned up a sample quantity of heroin and approximately $12,000 in cash. Reyers testified that after the search, Simone Zito said that if the search had taken place a day later "they would have

caught us with four kilos of heroin."

As we have noted, following trial, Francesco Gambino, Tony Mannino, Sal Mannino, and Grace Mannino were convicted of conspiring to import and distribute heroin, Sal and Grace Mannino were convicted of money laundering, and Enzo Varisco was convicted of conspiring to distribute cocaine. The townhouse was forfeited to the United States government pursuant to 21 U.S.C. Section 853.[3]

All of the defendants appeal on various grounds. For the reasons discussed below, we will affirm the district court.

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3. Francesco Gambino was sentenced to 30 years' imprisonment, Tony Mannino, 27 years' imprisonment, Sal Mannino, 18 years' imprisonment, Enzo Varisco, 15 years' imprisonment, and Grace Mannino, one year and one day in prison.

II. Coconspirator Hearsay

Kane's recounting of Tony Mannino's assertion that he and Simone Zito worked for Francesco Gambino was one of the most compelling pieces of evidence offered against Gambino. Federal Rule of Evidence 801(d)(2)(E) exempts from the hearsay rule "a statement by a coconspirator of a party during the course of and in furtherance of the conspiracy." In determining whether the coconspirator exception applies in a particular case, the trial court must determine, by a preponderance of the evidence, that there was a conspiracy between the declarant and the party against whom the evidence is offered; and that the hearsay statements sought to be admitted were made during the

course of the conspiracy and in furtherance of its goals. *Bourjaily* v. *United States*, 483 U.S. 171, 175-76, 107 S.Ct. 2775, 2778-79, 97 L.Ed.2d 144 (1987). Gambino contends that there was insufficient evidence of his participation in the conspiracy, and also that the hearsay statement should not have been admitted subject to later connection.

A.

Specifically, Gambino alleges that it was error for the district court to admit the hearsay statements prior to determining their admissibility. We begin with the observation that "the control of the order of proof at trial is a matter committed to the discretion of the trial judge." *United States* v.

Continental Group, Inc., 603 F.2d 444, 456 (3d Cir.1979), *cert. denied*, 444 U.S. 1032, 100 S.Ct. 703, 62 L.Ed.2d 668 (1980); *see also United States* v. *Ammar*, 714 F.2d 238, 245-47 (3d Cir.) (upholding admission of coconspirator statements subject to later connection), *cert. denied*, 464 U.S. 936, 104 S.Ct. 344, 78 L.Ed.2d 311 (1983); *In re Fine Paper Antitrust Litigation*, 685 F.2d 810, 820-21 (3d Cir.1982) (holding that *Continental Group* permitted, but did not require, admission of coconspirators' hearsay statements subject to later connection), *cert. denied*, 459 U.S. 1156, 103 S.Ct. 801, 74 L.Ed.2d 1003 (1983). We review for abuse of discretion. *Ammar*, 714 F.2d at 247.[4]

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4. We have not been able to find in the record a timely objection. Gambino did

(Footnote continued on following page)

There is a danger that if hearsay statements of an alleged coconspirator are admitted subject to later connection, the court may determine at the close of evidence that the offering party did not meet its burden of establishing a conspiracy and the jury would be irremediably prejudiced. Therefore we have counseled that the

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(Footnote continued from preceding page) not object when the challenged statement was elicited from Kane at trial. On appeal, Gambino asserts that he objected to the statement in several pretrial motions, and provides three citations to the record. We have examined his citations, but none of the cited materials raise this objection. Gambino also asserts that the defendants repeatedly requested findings on the admissibility of coconspirator statements during trial, but offers no record citations. Therefore we could review this, and the other challenges to the admission of Kane's statement that he worked for Gambino, under a plain error standard.

practice of admitting coconspirator hearsay statements subject to later connection "be carefully considered and sparingly utilized by the district courts." *Continental Group*, 603 F.2d at 457.

At the same time, we have consistently recognized that "the order-of-proof problem confronting the trial judge is a particularly difficult one where the government is attempting to prove the participation of multiple defendants in a continuing conspiracy." *Id.* at 456 (quoting *United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 195 (3d Cir.1970) (upholding the district court's decision to admit coconspirator hearsay subject to later connection because "given the

large amount of interrelated testimony to be considered in this case, we believe that alternative approaches may have been unduly complex and confusing to the jury or to the court." *Id.* at 457. Similar difficulties confront the trial judge in many large-scale conspiracy cases.

This case is no exception. The government's proof consisted of a large amount of interrelated testimony. Except for Kane, most of the government's witnesses testified only to discrete corners of the conspiracy. Only Kane provided a common thread linking virtually all the conspiracy's actions. Therefore the conspiracy became clearly defined only after the testimony of several witnesses. For these reasons,

we find that the district court's decision to admit the testimony subject to later connection was not an abuse of discretion.

B.

Gambino also contends that timing aside, the government did not adequately establish his connection to the conspiracy. As we have noted, the trial court must determine, by a preponderance of the evidence, whether the defendant and the declarant were members of the alleged conspiracy, and whether the hearsay statements were made during the course of the conspiracy and in furtherance of its goals. *Bourjaily*, 483 U.S. at 175-76, 107 S.Ct. at 2778-79 (1987). Before the adoption of Fed.R.Evid. 104(a), proof of a conspira-

cy required evidence external to the hearsay statement itself. This rule was premised on the belief that a statement should not be able to "lift itself by its own bootstraps to the level of competent evidence." *Glasser* v. *United States,* 315 U.S. 60, 75, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942). *Bourjaily* made clear, however, that the adoption of Fed.R.Evid. 104(a) changed the earlier rule, and that the coconspirator's hearsay statement could be used to establish the existence of a conspiracy.

In *Bourjaily,* the Court expressly declined to decide whether a trial court could rely "solely upon [the declarant's] hearsay statements to determine that a conspiracy had been

established by a preponderance of the evidence." *Bourjaily*, 483 U.S. at 181, 107 S.Ct. at 2781. Here there is sufficient evidence external to the hearsay statement itself so we need not address that issue today.[5]

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5. The Court did not alter that presumption, but held that the ways in which it could be rebutted had been expanded by the adoption of Fed.R.Evid. 104(a). "[A] piece of evidence, unreliable in isolation, may become quite probative *when corroborated by other evidence*.... [T]rial courts must be permitted to evaluate these statements for their evidentiary worth as revealed by the particular circumstances of the case." 483 U.S. at 180, 107 S.Ct. at 2781 (emphasis added). In the absence of any evidence to the contrary, however, the presumption of unreliability controls; and the hearsay statement cannot serve as the basis for establishing the declarant's connection to the conspiracy. *United States* v. *Garbett*, 867 F.2d 1132, 1134 (8th Cir.1989) ("It is generally agreed that an 'otherwise inadmissible hearsay statement cannot provide the sole evidentiary support for its own admissi-

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The district court assumed a need for some external evidence, and found that Gambino was a member of the conspiracy, and that the hearsay statement to Kane was made during the course of and in furtherance of that conspiracy. We review the district court's determination under a clearly erroneous standard. *United States* v. *Cruz*, 910 F.2d 1072, 1081 n. 11 (3d. Cir.1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 709, 112 L.Ed.2d 698 (1991).

(Footnote continued from preceding page) bility.'") (quoting *Bourjaily*, 483 U.S. at 184, 107 S.Ct. at 2783 (Stevens, J., concurring)); *United States* v. *Gordon*, 844 F.2d 1397, 1402 (9th Cir. 1988) ("[T]here must be some evidence, aside from the proffered statements, of the existence of the conspiracy and the defendant's involvement."); *United States* v. *Daly*, 842 F.2d 1390, 1386 (2d Cir.) (assuming that some independent evidence is necessary), *cert. denied*, 488 U.S. 821, 109 S.Ct. 66, 102 (L.Ed.2d 43 (1988).

The following independent evidence indicates that Gambino was involved in the conspiracy to import and distribute narcotics. First, there is the March, 1988 discussion in the Cafe Giardino between Kane and Simone Zito. After some bickering about the price of heroin, Simone Zito left for another area of the cafe, and upon returning Zito told Kane that the price was negotiable, and that he could have a sample of the heroin. Shortly thereafter, Kane observed that Francesco Gambino and a bartender were the only other people in the cafe. It was a permissible inference that Zito went to Gambino for authority to negotiate price.

Francesco Gambino was also strongly

implicated through the compromising of confidential grand jury proceedings. Simone Zito provided Ryers with a list of four names, and asked Kane to inform him if any of the names were mentioned in grand jury proceedings. Gambino's name was on that list, along with the names of Simone Zito, Tony Mannino, and fugitive codefendant Domenico Mannino. It was a permissible inference that these individuals were linked in the drug trade.

Filippo Ricupa's testimony also tied Gambino to the conspiracy. In the 1985 money drop described in Part I, Gambino was in a car in front of the restaurant, and received the bags that DiMaggio brought downstairs. Furthermore, electronic surveillance revealed regular

telephone calls between Gambino and Tony and Grace Mannino, many of which involved when Tony Mannino would arrive in Brooklyn for his frequent meetings with Gambino. When viewed in light of the other evidence they corroborate Gambino's involvement.

Finally, a series of FBI surveillance photographs showed Gambino in the presence of many of the coconspirators, in particular Tony Mannino and Simone Zito, during "key periods of the conspiracy." *United States* v. *Gambino*, 728 F.Supp. 1150, 1155 (E.D.Pa. 1989). Mere association "cannot alone support a conviction for conspiracy. *United States* v. *Torres*, 519 F.2d 723, 725-26 (2d Cir.), *cert. denied*, 423 U.S. 1019, 96 S.Ct. 457, 46 L.Ed2d 392 (1975). On

the other hand, the timing and circumstances of a meeting or series of meetings may be sufficiently suspicious to permit a reasonable inference of complicity in the criminal enterprise." *United States* v. *Ammar*, 714 F.2d 238, 250 (3d Cir.1983). In *Ammar*, we held that evidence of repeated meetings with other members of the conspiracy coinciding with heroin importations appropriately could be considered in determining whether the coconspirator exception to the hearsay rule was applicable. Here, also, consideration of the photographs was appropriate.

To this evidence we now add the hearsay statement sought to be admitted. According to Kane, Tony Mannino directly asserted to Kane that Gambino

was Mannino's and Zito's boss in the drug trade. The district court, which heard the testimony, concluded that all of this evidence, taken together, established by a preponderance of the evidence Tony Mannino and Simone Zito's membership in a conspiracy with Gambino. This determination was not clearly erroneous.

III.

All of the defendants challenge the admission and use of several witnesses' guilty pleas.

A.

At trial, the government presented several witnesses who were coconspirators and who had pled guilty. While on the stand, the government elicited testimony about their guilty

pleas. Defendants contend that these references to the coconspirators' guilt were prejudicial and deprived them of a fair trial.

Defendants did not object during the witnesses' testimony. Therefore, we review this matter under a plain error standard. *See* Fed.R.Evid. 103(a)(1) (requiring a "timely objection ... stating the specific ground of objection, if the specific ground was not apparent from the context"); *United States* v. *Pungitore*, 910 F.2d 1084, 1125-26 (3d Cir.1990) (reviewing for plain error statements to which defendants did not object), *petition for cert. filed*, Dec. 6, 1990 (No.

90-6472).[6] Under the plain error standard (Fed.R.Crim.P. 52(b)), we can correct "'only particularly egregious errors, those errors that seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *United States* v. *Thame*, 846 F.2d 200, 204 (3d Cir.) (quoting *United States* v. *Young*, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)), *cert. denied*, 488 U.S. 928, 109 S.Ct. 314, 102 L.Ed.2d 333 (1988).

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6. Some of the testimony was objected to on other grounds. For example, defendants objected to the admission of Zepp's guilty plea on the ground that Zepp's discussion of the plea agreement included a reference to the protection the government was providing him. That did not preserve the objection that is currently before us. *See, e.g., United States* v. *Field*, 875 F.2d 130, 134 (7th Cir.1989) ("Neither a general objection to the evidence nor a specific objection on other grounds will preserve [an] issue on review.").

There are strong considerations against using a coconspirator's guilt as substantive evidence of another defendant's guilt. "The foundation of [this] policy is the right of every defendant to stand or fall with the proof of the charge made against him, not against somebody else.... The defendant ha[s] a right to have his guilt or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else." *Bisaccia* v. *Attorney General of New Jersey*, 623 F.2d 307, 312 (3d. Cir.) quoting *United States* v. *Toner*, 173 F.2d 140, 142 (3d Cir.1949)), *cert. denied*, 449 U.S. 1042, 101 S.Ct. 622, 66 L.Ed.2d 504 (1980). In *Bisaccia*, a *habeas*

corpus proceeding, we held that a prosecutor's use of a coconspirator's guilty plea to establish another defendant's guilt was error, and remanded for a determination of whether the error was harmless.

This specter is not implicated when a guilty plea is introduced not to establish a coconspirator's guilt, but for some valid purpose. For example, in *United States* v. *Inadi,* 790 F.2d 383, 384 n. 2 (3d Cir.1986), we upheld the admission of a conspirator's guilty plea "in order to rebut defense counsel's persistent attempts on cross-examination to raise an inference that the coconspirators had not been prosecuted, and that Inadi was being singled out for prosecution."

In any criminal trial, the credibility of the prosecution's witnesses is central. By eliciting the witness' guilty plea on direct examination, the government dampens attacks on credibility, and forecloses any suggestion that it was concealing evidence. Such disclosure is appropriate. *See United States* v. *Casto,* 889 F.2d 562, 567 (5th Cir.1989) ("Because it was reasonable for the prosecution here to believe that [defendant's] counsel would attempt to impeach [a testifying coconspirator's] implicating testimony by questioning her about her guilty plea, it was also reasonable for the prosecutor to adduce this fact during her opening examination of [the testifying coconspirator]."),

cert. denied, ____ U.S. ____, 110 S.Ct. 1164, 107 L.Ed.2d 1067 (1990); *United States* v. *Dworken,* 855 F.2d 12, 30 (1st Cir.1988) ("[T]he fact of [a] guilty plea and the plea agreement properly may be elicited to dampen the effect of an anticipated attack on the witness' credibility."); *United States* v. *Louis,* 814 F.2d 852, 856 (2d Cir.1987) ("Proper purposes [for coconspirators' guilty pleas] include disclosure of matters damaging to the credibility of a witness and contradiction of any inference that the government is concealing a witness' bias."); *see also* 2 J. Weinstein & M. Berger, *Evidence* paragraph 410[07], at n. 3 (1990) (If a co-offender who appears as a witness has pled guilty, "the trier must know about the plea's

existence in order to evaluate the witness' testimony."). In this case, the defendants began their attack on the credibility of the government's witnesses in their opening statements to the jury. Yet even in the absence of this attack, the elicited testimony was proper here.

At the same time, it is important that the jury understand the limited purposes of a coconspirator's guilty plea. Here, in its final charge, the district court properly instructed the jury that the guilt of any one person was not substantive evidence of the guilt of any other person. We also note that the guilty pleas were not emphasized by the prosecutor during direct examination, and were not in-

appropriately emphasized during closing argument. We believe that the appropriate uses of the pleas were clear. The references to the pleas were not an abuse of discretion, let alone plain error.

B.

Defendants level a special attack on the testimony of Robert Reyers. He started the trial as a defendant but pled guilty on the twelfth of twenty-six days of trial and became a witness for the prosecution. During the government's case in chief, Reyers corroborated some of Kane's testimony through his own recollection of events, and also testified that Kane had told him about many of the incidents Kane mentioned at trial.

Defendants timely objected to Reyers' testimony on the grounds that it would impermissibly suggest the guilt of the remaining defendants. We review the district court's decision to admit Reyers' testimony for abuse of discretion. *See United States* v. *Pungitore*, 910 F.2d 1084, 1151 (3d Cir.1990), *petition for cert. filed*, Dec. 6, 1990 (No. 90-6472).[7]

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7. Defendants raise two further objections to Reyers' testimony. First, they contend that the district court should have declared a mistrial even before the jury was apprised of Reyers' plea during his testimony, because the mere fact of his disappearance strongly implied his guilt, and in turn implicated the other defendants. Any such inference was foreclosed by the court's clear instruction to the jurors, immediately after they entered the courtroom on the first day following Reyers' plea, that they were not to infer anything from Reyers' absence. At that point in the trial, we find no

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As we have noted, guilty pleas are properly elicited on direct examination to dampen subsequent attacks on credibility, and to foreclose any suggestion that the party producing the witness was concealing evidence. That conclusion applies equally to Reyers' testimony. Reyers' relationships with the remaining defendants could have created the possibility for the prejudice that we warned of in *Bisaccia*. Here, the district court avoided those dangers. As we have noted, the district court properly instructed

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(Footnote continued from preceding page) prejudice to the other defendants. Second, defendants contend that Reyers' testimony impermissibly bolstered Kane's credibility as a witness, because the jury might infer that Kane's testimony was one of the reasons Reyers pled guilty. We deal with this objection below.

the jury on the appropriate uses of guilty pleas, and as with the guilty pleas of the other coconspirators, Reyers' guilty plea was not emphasized by the prosecutor during direct examination, and was not inappropriately emphasized during closing argument. We believe that the appropriate uses of Reyers' plea were clear, and that the district court's decision to admit Reyers' testimony and to allow mention of his guilty plea was not an abuse of discretion.

This case is factually similar to *United States* v. *Kilrain,* 566 F.2d 979 (5th Cir.1978), *cert. denied,* 439 U.S. 819, 99 S.Ct. 80, 58 L.Ed.2d 109 (1978). In that case, one of the defendants pled guilty in the middle of trial and became

a government witness. The remaining defendants, who were convicted, contended that the defendant who pled guilty had been privy to their defense strategy, and therefore they were deprived of a fair trial. The Court of Appeals for the Fifth Circuit upheld the convictions, observing that the remaining defendants needed to demonstrate some "actual prejudice resulting from [the witness'] supposed knowledge of defense strategy, or that [the witness] communicated such knowledge to the government." 566 F.2d at 983. In this case, defendants have not alleged any specific prejudice. Although the Sixth Amendment claim raised in *Kilrain* is different than the claim raised here, *Kilrain* lends support

to our result today.

C.

Defendants also object to remarks made by the prosecution during closing arguments. Before discussing the challenged remarks, we must place them in context. A central focus of defendants' closing arguments - indeed much of their defense at trial - was Kane's lack of credibility. Counsel for Tony Mannino argued that "William Kane, as [the prosecution] knew before they put him on the stand, is a perjurer. Simple. He's got a history of it.... He told you he's a gangster, he's a wiseguy, he's a thug who goes around threatening people with a gun.... You decide: murder or liar? Either way, his testimony isn't worth anything.

William Kane is a cold, calculating individual who came here and lied even as we sat ...."

Even more telling, counsel for defendant Fodera, who was acquitted by the jury, pointedly made an issue of Reyers' lack of belief in Kane. In his closing argument, he remarked:

> This case is unique in the trials of criminal cases in that this is one of the rare instances that you will ever see where you will see one of the government witnesses get on the stand and say to you, as happened in this case, that another one is a liar and a perjurer. Do you remember Reyers, the fellow who used to sit in that corner over there, who pled guilty and became a government witness? Reyers testified in connection with this case, and Reyers, one of the things that he said is that Kane, when he testified in this court, lied. So, you have one witness characterizing another government witness as a perjurer.

The reference is to testimony by Reyers, elicited during cross-examination, recalling a conversation that Reyers had with Gambino's attorney before Reyers pled guilty. Reyers had told Gambino's attorney that he believed that Kane was lying on the stand. Later in his closing, counsel for Fodera again sounded this refrain:

> And Mr. Reyers, who was one of [the prosecution's] witnesses ... said [Kane] lied on the witness stand and he was a liar, and I accuse [Kane] of being a murderer and I accuse him of being a perjurer, and I submit to you that it is not fair, it is not just, to try to convict [Fodera] solely on the testimony of a murderer, a perjurer, a robber, a burglar, a career criminal.

After these remarks, the prosecution, in its rebuttal remarks to the jury, suggested that Reyers' guilty plea

belied his asserted lack of faith in the veracity of Kane's testimony.

> Now [Counsel for Tony Mannino], in talking about William Kane, told you what a liar he was, and other attorneys have. But remember this: Reyers and Joseph Cuffaro thought that he was such a liar that, based on his evidence against them, they pled guilty .... You heard Mr. Cuffaro testify that, as the result of the sale of 15 kilograms of cocaine in Florida, he was indicted, and the sale was to Bill Kane. He was indicted and he pled guilty. And you heard Mr. Reyers, that he pled guilty, and you heard during the course of this trial that the evidence against Mr. Reyers came primarily from William Kane.

Defendants timely objected to the prosecution's statements, and now contend that the reference to Reyers' and Cuffaro's guilty pleas deprived them of a fair trial. We review the district court's denial of a motion for a

mistrial on these grounds for abuse of discretion. *See United States* v. *DiLoreto*, 888 F.2d 996 (3d Cir.1989). We will reverse if "the prosecutor's remarks, taken in context of the trial as a whole, were sufficiently prejudicial to have deprived [defendants of their] right to a fair trial." *United States* v. *DiPasquale*, 740 F.2d 1282, 1297 (3d Cir.1984), *cert. denied*, 469 U.S. 1228, 105 S.Ct. 1226, 84 L.Ed.2d 364 (1985).

Defendants raise two related arguments. First, they contend that the fact of Reyers' and Cuffaro's guilty pleas cannot appropriately be used to bolster Kane's credibility by suggesting that they, at least, believed Kane. Second, they argue that even if the

prior guilty pleas are relevant, mentioning them warrants a mistrial because it suggests that the remaining defendants are guilty merely by virtue of their association with those who pled guilty.

At the outset, we note that the comments by the prosecutor were proper as a fair and invited response to the defendant's vehement attacks on Kane's credibility. "[P]rosecutorial comment must be examined in context." *United States* v. *Robinson,* 485 U.S. 25, 33, 108 S.Ct. 864, 869, 99 L.Ed.2d 23 (1988). In *Robinson,* defendant's attorney had argued that the government had unfairly deprived his client, who did not testify at trial, of an opportunity to explain his actions. In his closing argument,

the prosecutor commented that the defendant had the opportunity to take the stand and testify if he so desired. Defendant claimed that this reference deprived him of his right to be free from compulsory self-incrimination under the Fifth Amendment and under 18 U.S.C. Section 3481 (1988). The Court rejected this claim, reasoning that the comments were a fair response to defendant's attacks. Similarly, in *United States* v. *Pungitore,* 910 F.2d 1084, 1120-27 (3d Cir.1990), *petition for cert. filed,* Dec. 6, 1990 (No. 90-6472), we held that a prosecutor's summation reference to his oath of office was a proper response to a closing argument attack on the integrity of the prosecution that ranged beyond any evidence adduced at trial.

See also United States v. *Arnold*, 890 F.2d 825, 830 (6th Cir.1989) (prosecutor's mention of codefendants' guilty pleas in closing argument appropriate rehabilitation of a witness' credibility); *United States ex rel. Paxos* v. *Rundle*, 491 F.2d 447, 453 (3d Cir.1974) ("'counsel does have the right to reply to an argument raised by his opposing advocate'") (quoting *United States* v. *Casteel*, 476 F.2d 152, 155 (10th Cir.1973)).

The reference to Reyers' guilty plea was appropriate as a direct response to a specific argument made by the defense. *See United States* v. *Sanchez*, 790 F.2d 1561 (11th Cir.1986). In *Sanchez*, defendant was convicted of money laundering. He was involved in several

transactions with an investment firm established by the DEA for the purpose of investigating the laundering of drug proceeds. Defendant attacked, on cross-examination, one of the prosecution witness' "suitability for federal investigative work." 790 F.2d at 1564. The Court of Appeals for the Eleventh Circuit upheld the admission of testimony by a DEA agent that the witness had been found reliable in other investigations, because the testimony was a direct response to the defendant's attack. *See also* Fed.R.Evid. 608; McCormick, *Evidence* Section 49 (3d Ed. 1984).

We note that at least one other United States Court of Appeals has found guilty pleas relevant and admissible

evidence of a witness' veracity when invoked as a direct response to a specific attack. In *United States* v. *Martinez*, 775 F.2d 31, 36-38 (2d Cir.1985), much of the prosecution's case turned on the testimony of one witness, who like the defendant was an inmate in a state prison. The defendant pointed out that the witness had accused other inmates and guards of committing crimes, suggesting that the witness had fabricated these accusations to curry favor with the prison administration and to procure an early release. The prosecution rejoined with testimony establishing that all of the guards accused by the witness had pled guilty. The Court of Appeals for the Second Circuit approved, holding that admission

of these other guilty pleas was not an abuse of discretion. *Id.* at 38. *Cf. United States* v. *Lochmondy*, 890 F.2d 817, 820-22 (6th Cir.1989) (upholding a conviction when the government had, during closing, observed that one of the prosecution's witnesses had testified in other cases that resulted in convictions); *Arnold*, 890 F.2d at 830.

In this case, defendants made an issue of Reyers' belief in Kane in closing arguments. The reference to Reyers' plea on rebuttal was an appropriate response. Defendants never specifically made an issue of Cuffaro's belief in Kane, so we find the reference to Cuffaro's plea more troubling. Even if we were to find that this was error, however, it would be harmless, because

Cuffaro did not play a central role in either the conspiracy or the government's case at trial. In contrast, the issue of Kane's credibility was constantly revisited, by all parties, throughout the twenty-six day trial. Cuffaro's guilty plea was in an unrelated proceeding, and the role Kane's testimony played in that plea was and remains, unclear. The one reference to Cuffaro's plea was not, when "taken in context of the trial as a whole, sufficiently prejudicial to have deprived [defendants of their] right to a fair trial." *United States* v. *DiPasquale,* 740 F.2d 1282, 1297 (3d Cir.1984), *cert. denied,* 469 U.S. 1228, 105 S.Ct. 1226, 84 L.Ed.2d 364 (1985).

It is significant that the challenged

statements left undisturbed the jury's prerogative to decide all questions of credibility. If there was any ambiguity, it was cleared up in the district court's instructions, in its final charge, that evaluating the credibility of witnesses was the function of the jury. *Cf. United States* v. *Hilton*, 772 F.2d 783, 786 (11th Cir.1985) ("When bolstering testimony suggests to the jury that a witness bears the responsibility for determining the truth of the evidence, admission of the testimony may constitute reversible error.") (citing *United States* v. *Price*, 722 F.2d 88, 90 (5th Cir.1983)); *United States* v. *Murray*, 445 F.2d 1171, 1176 n. 7 (3d Cir.1971); *United States* v. *DiLoreto*, 888 F.2d 996, 999 (3d

Cir.1989) (prosecutorial vouching for the credibility of a witness improper).

Even if otherwise appropriate, the challenged references to guilty pleas could still constitute reversible error if used as substantive evidence of the defendants' guilt. As we have noted, such use poses the threat that a defendant will be found guilty not on the basis of evidence against him, but on the basis of a shadow cast by cases against others. *Bisaccia* v. *Attorney General of New Jersey,* 623 F.2d 307, 312-13 (3d Cir.) (quoting *United States* v. *Toner,* 173 F.2d 140, 142 (3d Cir.1949)), *cert. denied,* 449 U.S. 1042, 101 S.Ct. 622, 66 L.Ed.2d 504 (1980). Therefore we must determine whether the appropriate use of the references was

sufficiently clear.

As we have noted, there was a direct nexus between Reyers' plea and the attacks on Kane's credibility. This nexus made clear that the pleas were not offered as substantive evidence of the defendants' guilt. Cuffaro's plea, also, was mentioned in response to attacks on Kane's credibility. The connection to Kane's credibility was far less direct, and therefore the purpose less clear. As we have mentioned, however, he was not centrally involved in the conspiracy in this case. His guilty plea was entered in a different proceeding, and when he described his plea to the jury he mentioned only that he had purchased cocaine from Kane, and did not mention any of the defendants.

Recalling this testimony in closing argument did not imply that any of the defendants were guilty of the offenses charged in this case. Finally, any possible misunderstanding of the appropriate use of the guilty pleas was cleared up by the district court's jury instructions. The court explicitly told the jury that the guilt of any person was not evidence of any other person's guilt. Defendants did not object to this charge. We view this as adequate, because under Fed.R.Crim.P. 30, "[i]f a more specific curative instruction were thought necessary, counsel should have requested one before the jury retired." *United States* v. *Thame*, 846 F.2d 200, 204 (3d Cir.), *cert. denied*, 488 U.S. 928, 109 S.Ct. 314, 102 L.Ed.2d 333

(1988).

For these reasons, the prosecutor's remarks did not deprive defendants of a fair trial, and the district court's denial of defendants' motion for a mistrial on this ground was not an abuse of discretion.

IV.

Defendants raise several other grounds for appeal. First, they challenge the sufficiency of the evidence supporting their convictions and the forfeiture of the house. We have reviewed the record, and find those arguments without merit. *See Burks* v. *United States*, 437 U.S. 1, 16, 98 S.Ct. 2141, 2149, 57 L.Ed.2d 1 (1978); *United States* v. *Pungitore*, 910 F.2d 1084, 1128-29 (3d Cir.1990), *petition for*

cert. filed, Dec. 6, 1990 (No. 90-6472).

Defendants also claim that the district court improperly admitted Kane's hearsay testimony recounting matters about the conspiracy told him by Stefano Zito. Those statements were admitted under the coconspirator exception we have already discussed. Defendants contend there was insufficient evidence establishing Stefano Zito's membership in the conspiracy; and that the statements were not in furtherance of the conspiracy. We disagree, and find those contentions without merit.

Defendants raise several other claims. They contend that: the district court's instructions to the jury were flawed; the prosecutors cre-

ated or altered certain critical documents; the prosecutors improperly referred to charges pending against Simone Zito and Tony Mannino in Italy during trial; defendants were prejudiced by the handing down of a superseding indictment six weeks prior to trial; the government failed adequately to minimize intercepted communications; the jury had available during its deliberations prejudicial tapes that had not been admitted into evidence; and the district court erroneously failed to quash a superseding indictment or order the government to provide a bill of particulars. We have considered each of these arguments and find them without merit.

For the foregoing reasons, we will affirm the judgments of sentence.

Supreme Court, U.S.
FILED
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Nos. 91-199 and 91-439

In the Supreme Court of the United States

OCTOBER TERM, 1991

FRANCESCO GAMBINO, PETITIONER

v.

UNITED STATES OF AMERICA

IGNAZIO ANTONINO MANNINO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a district court may conditionally admit co-conspirator declarations subject to a determination at the close of the evidence that the government has satisfied the requirements of Federal Rule of Evidence 801(d)(2)(E).

2. Whether a mistrial should have been declared after one of the defendants changed his plea to guilty in the middle of petitioners' trial, and, if not, whether that defendant should have been barred from testifying for the government.

3. Whether the government made improper use, during closing argument, of the guilty pleas of a defendant and another testifying co-conspirator.

4. Whether federal agents conducting electronic surveillance failed to minimize the interception of conversations as required by 18 U.S.C. 2518(5).

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-199

FRANCESCO GAMBINO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 91-439

IGNAZIO ANTONINO MANNINO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 43a-104a,[1] is reported at 926 F.2d 1355. The opinion of the

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[1] "Pet. App." refers to the appendix to the petition in No. 91-199.

district court, Pet. App. 1a-42a, is reported at 728 F. Supp. 1150.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1991. Pet. App. 43a-104a. On May 17, 1991, Justice Souter extended the time for filing a petition for a writ of certiorari to July 22, 1991. On July 9, 1991, Justice Souter further extended the time for filing a petition for a writ of certiorari to August 1, 1991. The petition in No. 91-199 was filed on that date.

On June 6, 1991, Justice Souter denied a request by the petitioners in No. 91-439 for an extension of time to file a petition for a writ of certiorari. The petition in No. 91-439 was not filed until September 13, 1991, and is therefore substantially out of time under Rule 13.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioners Francesco Gambino, Ignazio Antonino (Tony) Mannino, and Emannuele Salvatore (Sal) Mannino were convicted of conspiring to import heroin, in violation of 21 U.S.C. 963, and conspiring to distribute heroin, in violation of 21 U.S.C. 846. Sal Mannino was also convicted of money laundering, in violation of 18 U.S.C. 1956(a)(1). Petitioner Enzo Varisco was convicted of conspiring to distribute cocaine, in violation of 21 U.S.C. 846. The district court sentenced Gambino to a total of 30 years' imprisonment, to be followed by five years' supervised release, and ordered him to pay a $50,000 fine. C.A. App. 653-656. The court sentenced Tony Mannino to a total of 27 years' imprisonment, to be followed by five years' supervised release, and

ordered him to pay a $25,000 fine. C.A. Supp. App. 113-117. The court sentenced Sal Mannino to a total of 18 years' imprisonment, to be followed by five years' supervised release, and ordered him to pay a $25,000 fine. C.A. Supp. App. 118-122. The court sentenced Enzo Varisco to 15 years' imprisonment, to be followed by five years' supervised release, and ordered him to pay a fine of $10,000. C.A. Supp. App. 123-127. The court of appeals affirmed. Pet. App. 43a-104a.

1. The evidence at trial showed that petitioner Francesco Gambino supervised the importation and distribution of heroin in the New York-New Jersey area from 1985 to 1988. The scheme was coordinated by petitioner Tony Mannino and Simone Zito, with assistance from Tony Mannino's brother petitioner Sal Mannino, Tony Mannino's wife Grace Mannino, and Simone Zito's brother Stefano Zito. Petitioner Enzo Varisco was one of the conspiracy's cocaine distributors.[2] Pet. App. 44a.

William Kane, an FBI informant and the government's principal witness at trial, ran an illegal video poker business in New York City with Giuseppe "Joe" Gambino. Kane operated the business out of the Cafe Giardina in Brooklyn, which was owned by Joe Gambino. Through his illegal gambling business, Kane gained first-hand knowledge of the conspiracy in this case. Pet. App. 45a.

In October 1986, Kane became a confidential informant for the FBI. In 1986 and 1987, Kane was introduced to Simone Zito and Tony Mannino, and later to Simone Zito's brother, Stefano Zito. Stefano

[2] Co-defendants Simone and Stefano Zito were fugitives at the time of trial. Co-defendant Grace Mannino was tried and convicted with petitioners.

Zito and Kane became friends. In 1987, Stefano told Kane that he, his brother Simone Zito, and Tony Mannino were members of the Sicilian Mafia and that they were importing heroin into the United States. Stefano told Kane that Tony's brother Sal Mannino was in Sicily at that time, arranging an exchange of heroin for cocaine. FBI interceptions of telephone conversations confirmed that Sal Mannino was in Sicily at the time. Pet. App. 45a-46a.

Under FBI supervision, Kane began to participate in the conspirators' illegal activities. Since neither Simone nor Stefano Zito had any legal source of income, Kane carried them on the payroll of his video poker company. Kane also arranged financing for their automobiles. Pet. App. 46a.

In October 1987, Kane became directly involved in the conspiracy. In that month, Simone Zito told Kane that Simone wanted to purchase a townhouse, as an investment and as a place to cut heroin, but that all his money was tied up in heroin. After first discussing a possible loan, Simone agreed, in a tape-recorded conversation, to sell Kane seven ounces of heroin for $25,000. That conversation also revealed some of the details of Simone Zito's relationship with Tony Mannino. Kane mentioned that he did not want anyone to know about the transaction, not even Tony Mannino. Simone replied that "me and Tony's the same person." Pet. App. 47a.

Simone Zito delivered the heroin to Kane later that evening. The next day, Kane paid Simone Zito $25,000. Tony Mannino accompanied Simone to the meeting at which the payment was made. After the money was transferred, Kane, Mannino, and Simone discussed further heroin sales. In the course of subsequent discussions, Kane mentioned that his boss was Joe Gambino. Mannino responded that he and

Simone Zito were supervised by Francesco Gambino. Pet. App. 47a-48a.

On several other occasions, Kane and Simone Zito discussed heroin transactions in both recorded and unrecorded conversations. In March or April 1988, the two had a conversation in the Cafe Giardina that corroborated Mannino's earlier statement that he and Simone Zito worked for Francesco Gambino. Simone offered to sell Kane a kilogram of heroin on the spot. Kane could not purchase drugs without FBI authorization, but since he did not want to seem uninterested, he countered with a much lower offer. Simone then walked to the rear of the restaurant, out of Kane's sight. He returned with the information that the price was negotiable and that Kane could take a sample home to New Jersey. Shortly thereafter, Kane determined that the only people in the restaurant, other than himself and Simone Zito, were Francesco Gambino and a bartender. Pet. App. 48a-49a.

The government also presented evidence of the workings of the heroin importation scheme. Several members of the conspiracy who were indicted with petitioners pleaded guilty and testified for the government. One co-conspirator, Salvatore Allegra, testified that in 1985 he was asked by Tommaso Scalici to hire couriers to smuggle heroin into the United States. Supervised by Simone Zito, Allegra arranged for couriers to travel to the United States from Sicily with packages of heroin hidden on their bodies. In the United States, the heroin was delivered to Salvatore Caruso, an associate of Francesco Gambino's. Allegra oversaw several deliveries before he was arrested by Italian authorities in 1986. Pet. App. 49a-50a.

Two other incidents corroborated petitioners' role in the conspiracy. Kane helped Stefano and Simone Zito obtain automobiles. Kane made those arrangements through Robert Reyers, who owned an automobile dealership in southern New Jersey. Through those transactions, Reyers became familiar with Stefano and Simone Zito, Tony Mannino, and Enzo Varisco. Reyers testified as a witness for the government at trial. In January 1988, Reyers told Kane, Simone Zito, and Tony Mannino that Reyers' wife, a court reporter in the federal courthouse in Philadelphia, could obtain names that were referred to in proceedings before a federal grand jury sitting in the Eastern District of Pennsylvania. Soon afterwards, Simone Zito gave Reyers a list of four names, with instructions to contact him immediately if any of the names came up before the grand jury. Those names included Simone Zito, Tony Mannino, Domenico Mannino, and Francesco Gambino. Pet. App. 54a-56a.

The second incident was recounted by Simone Ricupa, a former heroin dealer in New York City. One day in 1985, Ricupa learned from his supplier, Sal DiMaggio, that DiMaggio's source of heroin wanted him to send a large amount of money to Italy as soon as possible. Ricupa gathered about $100,000 from some of his dealers, placed it in a paper bag and, as instructed, delivered the money to DiMaggio's restaurant. When he arrived at the restaurant, Ricupa saw Francesco Gambino sitting in a car parked near the restaurant. Ricupa and DiMaggio went into the restaurant, and DiMaggio went to an apartment upstairs. While he was waiting, Ricupa could see Gambino from the restaurant. DiMaggio returned downstairs with two large shopping bags, which he carried out to Gambino's car. After a quick discussion with Gambino, DiMaggio placed the bags

in the car, and Gambino drove away. Pet. App. 56a-57a.

2. a. The court of appeals affirmed petitioners' convictions. In response to Gambino's claim that the district court erred when it conditionally admitted out-of-court declarations prior to determining their admissibility, the court of appeals observed that "'the control of the order of proof at trial is a matter committed to the discretion of the trial judge.'" Pet. App. 60a. "[W]e have consistently recognized," the court noted, "that 'the order-of-proof problem confronting the trial judge is a particularly difficult one where the government is attempting to prove the participation of multiple defendants in a continuing conspiracy.'" *Id.* at 63a.

The court of appeals observed that the interrelated testimony in this case illustrates the impracticality of a requirement that the admissibility of co-conspirator declarations always be determined prior to the introduction of the declarations. The court explained that "[e]xcept for Kane, most of the government's witnesses testified only to discrete corners of the conspiracy. Only Kane provided a common thread linking virtually all the conspiracy's actions. Therefore the conspiracy became clearly defined only after the testimony of several witnesses." Pet. App. 64a-65a. The court held that the district court's decision to admit the testimony subject to later connection avoided unnecessary complexity and jury confusion, and was not an abuse of discretion.[3]

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[3] The court of appeals noted that Gambino did not timely object to Kane's testimony on the ground that the district court had not determined whether it was admissible. The court of appeals therefore concluded that it could review that challenge only for plain error. Pet. App. 61a-62a n.4. In addition, the court of appeals summarily dismissed the contention raised

b. The court of appeals also rejected petitioners' contention that the prosecution misused the guilty pleas of co-conspirator witnesses, and in particular that of Robert Reyers. Reyers started the trial as a defendant but changed his plea to guilty on the 12th day of the 26-day trial. Reyers then testified, during the government's case-in-chief, that some of Kane's testimony agreed with his own recollection of events and that Kane had told him about many of the incidents Kane mentioned at trial. Pet. App. 81a.

The court of appeals observed that guilty pleas are properly elicited on direct examination to dampen subsequent attacks on credibility and to foreclose any suggestion that the party producing the witness is concealing evidence. The court found that the government's introduction of Reyers' guilty plea, as well as those of other cooperating witnesses, was permissible on that basis. The court further found that the district court properly instructed the jury on the appropriate uses of guilty pleas, and that as with the guilty pleas of the other co-conspirators, Reyers' guilty plea was not inappropriately emphasized by the prosecution. Pet. App. 83a-84a.

The court of appeals also rejected petitioners' claim that remarks made by the prosecution during closing arguments required a new trial. The court observed that a central focus of petitioners' closing arguments and much of their defense at trial was Kane's alleged lack of credibility. Petitioners' counsel had vigorously attacked Kane in their closing arguments, having elicited that Reyers, while still a defendant, had commented to Gambino's counsel that Kane was a liar. Counsel for Tony Mannino argued that "[the

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by Tony Mannino and others that Stefano Zito's statements were not in furtherance of the conspiracy. *Id.* at 103a.

prosecution] knew before they put him on the stand" that Kane was "a perjurer." Pet. App. 86a-88a. Counsel for Gambino accused a prosecutor of cajoling Kane during a lunch break to alter his testimony. Tr. 4396. After those remarks, the prosecution, in its rebuttal argument to the jury, suggested that Reyers' guilty plea belied his asserted lack of faith in the veracity of Kane's testimony.

> Now [Counsel for Tony Mannino], in talking about William Kane, told you what a liar he was, and other attorneys have. But remember this: Reyers and Joseph Cuffaro thought that he was such a liar that, based on his evidence against them, they pled guilty. * * * You heard Mr. Cuffaro testify that, as the result of the sale of 15 kilograms of cocaine in Florida, he was indicted, and the sale was to Bill Kane. He was indicted and he pled guilty. And you heard Mr. Reyers, that he pled guilty, and you heard during the course of this trial that the evidence against Mr. Reyers came primarily from William Kane.

Pet. App. 89a.

The court of appeals found the prosecution's remarks to be "proper as a fair and invited response to the defendant's vehement attacks on Kane's credibility." Pet. App. 91a. The court found it significant that "the challenged statements left undisturbed the jury's prerogative to decide all questions of credibility. If there was any ambiguity, it was cleared up in the district court's instructions, in its final charge, that evaluating the credibility of witnesses was the function of the jury." Pet. App. 97a-98a.

The court of appeals noted that a prosecutor's references to guilty pleas would constitute reversible error if used as substantive evidence of a defendant's

guilt. But the court found a direct nexus between Reyers' plea and the attacks on Kane's credibility, and concluded that, as a result, the prosecutor's reference to Reyers' plea did not invite the jury to use the plea as substantive evidence of petitioners' guilt. Finally, the court noted, any possible misunderstanding of the appropriate use of the guilty pleas was removed by the district court's instruction to the jury that the guilt of any person was not evidence of any other person's guilt. Pet. App. 99a-101a.

c. The court of appeals summarily dismissed the claim by Tony Mannino and others that the government had failed adequately to minimize the interception of communications overheard as a result of court-authorized electronic surveillance. Pet. App. 104a.

ARGUMENT

1. Petitioners contend that the district court erred in admitting co-conspirator declarations at trial. Petitioner Gambino insists (91-199 Pet. 9-23) that it was improper for the court to admit the declarations before ruling them admissible. Petitioners Tony Mannino et al. maintain (91-439 Pet. 27) that Stefano Zito's statements were inadmissible because they were not made in furtherance of the conspiracy.

a. Federal Rule of Evidence 801(d)(2)(E) excludes from the definition of hearsay "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." Such statements are admissible upon a showing that the declarant and the party against whom the statement is offered were members of the conspiracy, and that the statement was made during the course of and in furtherance of a conspiracy. See *Bourjaily* v. *United States*, 483 U.S. 171, 175 (1987).

Gambino states that the district judge did not find that the requirements of Rule 801(d)(2)(E) had been met until "*after the jury had rendered its verdict.*" Pet. 10 (emphasis in original); see also Pet. i. In fact, the district judge made the findings required by the Rule at the conclusion of the government's case and before the matter went to the jury. See Tr. 4105-4109 (detailed findings by district court on admissibility of co-conspirator declarations). The question presented is therefore whether the district court erred in deferring a determination of the admissibility of the co-conspirator declarations until after the close of the government's case-in-chief.

The courts of appeals have unanimously rejected Gambino's contention that district courts should be barred from conditionally admitting co-conspirator declarations. Instead, they have held that district courts have discretion to admit statements of conspirators subject to a later determination that the defendant against whom the evidence was offered is a member of the charged conspiracy. See, *e.g.*, *United States* v. *Mobile Materials, Inc.*, 881 F.2d 866, 869 (10th Cir. 1989), cert. denied, 493 U.S. 1043 (1990); *United States* v. *Andrus*, 775 F.2d 825, 837 (7th Cir. 1985); *United States* v. *Haimowitz*, 725 F.2d 1561, 1575 (11th Cir.), cert. denied, 469 U.S. 1072 (1984); *United States* v. *Kimble*, 719 F.2d 1253, 1257 (5th Cir. 1983), cert. denied, 464 U.S. 1073 (1984); *United States* v. *Perez*, 658 F.2d 654, 658-659 (9th Cir. 1981); *United States* v. *Continental Group, Inc.*, 603 F.2d 444, 456 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980); *United States* v. *Nelson*, 603 F.2d 42, 44-45 (8th Cir. 1979); *United States* v.

Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970).[4]

Requiring a pretrial hearing in every case would have significant disadvantages, and the present case illustrates them well. A pretrial hearing would have been nothing short of "a mini-trial, significantly prolonging the proceedings in the case and affording the defendants a complete preview of the government's evidence." *United States* v. *Ianniello*, 621 F. Supp. 1455, 1478 (S.D.N.Y. 1985), aff'd, 808 F.2d 184 (2d Cir. 1986), cert. denied, 483 U.S. 1006 (1987). On the other side of the scale, Gambino suffered no prejudice, because the district court held all of the co-conspirator declarations to be admissible. Although Gambino suggests that a district court will be hesitant to reverse the conditional admission of co-conspirator declarations (91-199 Pet. 13-17, 22), that suggestion presupposes

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[4] None of the cases cited by petitioner (91-199 Pet. 12-13) conflicts with the above decisions. See *United States* v. *Ferra*, 900 F.2d 1057, 1059 (7th Cir. 1990) (expressing preference for the entry of *Bourjaily* findings prior to admission of co-conspirator statements, but expressly recognizing that "we have approved admission subject-to-connection" of co-conspirator declarations); *United States* v. *Hernandez*, 829 F.2d 988, 994 (10th Cir. 1987) (recognizing that "the trial court was justified in provisionally admitting the co-conspirator statements subject to being connected up"), cert. denied, 485 U.S. 1013 (1988); *United States* v. *Troutman*, 814 F.2d 1428, 1447-1448 (10th Cir. 1987) (recognizing that "the district court [may] admit the [co-conspirator] statements provisionally, subject to being 'connected up' by subsequent independent evidence"); *United States* v. *Miliet*, 804 F.2d 853, 857 n.2 (5th Cir. 1986) (recognizing that district court may make final determination as to satisfaction of Rule 801(d)(2)(E) "at the conclusion of the evidence"); *United States* v. *Holloway*, 731 F.2d 378, 381 (6th Cir. 1984) (recognizing that "the judge may admit the hearsay statements subject to later demonstration of their admissibility by a preponderance of the evidence").

that the only remedy in the case of a finding that some or all of the declarations are inadmissible is a new trial for all the defendants. If the district court had determined that certain co-conspirator declarations were inadmissible, the court could have either given a limiting instruction or entered a mistrial as to Gambino, and it could have continued the trial against the remaining defendants. In any event, the court of appeals agreed with the district court in this case that independent evidence proved that Gambino was a member of the conspiracy and that the statements in issue were made in furtherance of that conspiracy. Pet. App. 69a-73a.

b. Tony Mannino et al. contend that Stefano Zito's statements were "mere narratives of past events and did not further any goal of the conspiracy." 91-439 Pet. 27. Contrary to petitioners' contention, Stefano Zito was a member of the conspiracy, and his statements reflected his participation. For example, after Simone Zito fled in the Spring of 1988, Stefano Zito attempted to collect a heroin debt. Stefano told Reyers that "I know the guy owes us the money because I delivered [four kilograms of heroin] to him." Tr. 3380-3381. In 1987, Stefano told Kane that he had taken one of the heroin couriers to Florida as a reward for successfully smuggling in the heroin that had been exchanged for cocaine. Tr. 1428-1429. Stefano's trip to Florida was confirmed by electronic surveillance. GX 256. Stefano Zito was an active member of the importation conspiracy, and his conversations with his co-conspirators about his activities were essential to the continued functioning of the conspiracy and the allocation of responsibilities within it. Zito's statements were therefore in furtherance of the conspiracy and were admissible

under Federal Rule of Evidence 801(d)(2)(E). See Gov't C.A. Br. 35-38.

2. a. Petitioners contend (91-199 Pet. 28-29; 91-439 Pet. 33) that an immediate mistrial should have been declared after Robert Reyers changed his plea to guilty during the course of the trial and left the defense table. They cite no authority to support the claim that such a drastic remedy was required. Petitioners also claim (91-199 Pet. 30-32; 91-439 Pet. 32) that the district court's instruction that the jury "draw no conclusions" (Tr. 2105) from the fact that Reyers was no longer a defendant was insufficient to prevent the jury from speculating about the reasons for Reyers' disappearance. Yet no defendant objected or asked for a more detailed instruction, and the failure of the district court to give one surely does not amount to plain error. The jury was adequately instructed at the end of the case that "the fact that [others] have been found guilty of ~~those~~ offenses is not evidence that any of these defendants are guilty." Tr. 4489. If anything, petitioners benefited from the district judge's decision not to belabor Reyers' absence.

b. Petitioners next argue (91-199 Pet. 28-29; 91-439 Pet. 34) that Reyers should not have been permitted to testify for the government because he pleaded guilty in the middle of the trial, and that his post-guilty plea testimony was highly prejudicial. Petitioners cite no authority for their proposed "bright line" rule (91-439 Pet. 34) that testimony of pleading co-defendants should be barred if they stood trial for any length of time with the remaining defendants. Absent some showing of prejudice, there should be no bar to a defendant's pleading guilty during trial and then taking the stand. The situation is similar to the more common scenario in which a co-defendant

pleads guilty prior to trial and then testifies. In either case, the jury should be presumed to follow the court's instructions not to use the conviction of a cooperating witness as evidence of the remaining defendants' guilt.[5] *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987) (recognizing the "almost invariable assumption of the law that jurors follow their instructions"); *Lakeside* v. *Oregon*, 435 U.S. 333, 340 (1978); *Opper* v. *United States*, 348 U.S. 84, 94-95 (1954).

In its final charge, the district court directed the jury to focus on the defendants alone in determining guilt or innocence:

> [A] lot of names have been mentioned in this trial and you are not called upon to decide the guilt or innocence of anyone other than these defendants.
>
> You are expected to consider the evidence as it devolved around those other persons' names as

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[5] The Fifth Circuit faced an analogous issue in *United States* v. *Kilrain*, 566 F.2d 979, 982-983, cert. denied, 439 U.S. 819 (1978). In that case, one William Barber pleaded guilty after two days of a drug conspiracy trial and subsequently took the stand. The Fifth Circuit found no Sixth Amendment violation because the remaining "defendants have not demonstrated any actual prejudice resulting from Barber's supposed knowledge of defense strategy, or that Barber communicated knowledge to the government." *Id.* at 983. Petitioners have similarly failed to meet that burden. They have not cited any information that Reyers may have received while a defendant that was communicated to the government, nor have they demonstrated any other form of prejudice. Such prejudice must be proved; it may not be presumed. See *Weatherford* v. *Bursey*, 429 U.S. 545 (1977) (no constitutional violation where government agent posed as a defendant to preserve his cover and met with another defendant and his counsel to discuss upcoming trial, where defendant demonstrates neither receipt of confidential information by the government nor any other type of prejudice).

> it did, but you are not called upon to decide upon the guilt or innocence of those persons. Indeed, the fact that you may think that some of the other persons may be guilty or you may suspect that they may be guilty of certain offenses, or *the fact that they have been found guilty of ~~those~~ offenses is not evidence that any of these defendants are guilty.*

Tr. 4489 (emphasis supplied). The highlighted language was an obvious reference to those government witnesses who had entered guilty pleas.[6] There were no objections to the court's instruction, and it is obvious that it did not amount to plain error. The complete acquittal of co-defendant Fodera, and co-defendant Varisco's acquittal on the heroin distribution count strongly suggest that the jury was able to distinguish among counts and defendants, and did not return guilty verdicts based merely on association. Cf. *United States* v. *Saenz*, 747 F.2d 930, 942-943 (5th Cir. 1984), cert. denied, 473 U.S. 906 (1985).

3. The government introduced evidence of each cooperating witness's guilty plea during direct examination in anticipation of defendants' cross-examination. Petitioner does not seriously contend that this practice, which has been universally approved, was prejudicial. *E.g.*, *United States* v. *Dworken*, 855 F.2d 12, 30 (1st Cir. 1988); *United States* v. *Louis*, 814 F.2d 852, 856 (2d Cir. 1987); see also 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 410[07], at 410-50 & n.3 (1991).[7]

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[6] The government did not call any witnesses who had been convicted after trial.

[7] Gambino claims (91-199 Pet. 26-27, 34) that he was entitled to limiting instructions as to the use of the guilty pleas at the time Reyers and each cooperating witness testified. Neither Gambino nor his co-defendants requested such instructions, and none raised this issue in the court of appeals (except for a

Gambino contends (91-199 Pet. 35-41), however, that even if it was proper to call Reyers as a witness, his conviction still must be reversed because the prosecutor made an impermissible and prejudicial use of the guilty pleas of Reyers and witness Joseph Cuffaro.

Petitioners' summations to the jury focused on the credibility of the government's witnesses, especially William Kane. Tr. 4291-4305, 4313-4335, 4341-4343, 4345, 4373-4374, 4393, 4405-4410, 4412-4414. As the court of appeals found, the prosecutor's comment was an invited response to comments by petitioners' counsel suggesting that Kane was a liar and that Reyers' testimony proved it. It is of course improper, as petitioner states, to introduce the guilty pleas of others as substantive evidence of a defendant's guilt. But the prosecutor did not suggest that the jury should consider the pleas as evidence of guilt; he referred to them solely to rehabilitate Kane's credibility following an attack by petitioners' counsel in their closing arguments. See *United States* v. *Martinez*, 775 F.2d 31, 36-38 (2d Cir. 1985).[8] The record shows that

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passing reference to the fact that no instruction was given at the time of the testimony (Pet. C.A. Br. 45)). This Court therefore need not consider it. *FW/PBS, Inc.* v. *Dallas*, 493 U.S. 215, 237 (1990).

In any event, the failure to give limiting instructions did not amount to plain error since the jury was given an appropriate limiting instruction in the district court's final charge. Tr. 4489. In both of the cases upon which Gambino relies in claiming plain error (91-199 Pet. 34), the guilty pleas had been introduced as substantive evidence of guilt. *United States* v. *Harrell*, 436 F.2d 606, 614-615 (5th Cir. 1970); *Trussell* v. *United States*, 278 F.2d 478, 480 (6th Cir. 1960).

[8] Gambino's reliance (91-199 Pet. 35) on *United States* v. *Eason*, 920 F.2d 731 (11th Cir. 1990), is misplaced. The court of appeals in that case found that the prosecutor had gratuitously elicited from a witness that the defendant's father had been

defense counsel understood the comment to be directed to Kane's credibility rather than to their clients' guilt. See Tr. 4478, 4481. Furthermore, "[t]he trial judge was in the best position to determine the purpose behind these statements, and he apparently had no doubt that these statements were not being used as substantive evidence of guilt." *United States* v. *Arnold*, 890 F.2d 825, 830 (6th Cir. 1989). Finally, as we have noted, defense counsel did not object to or request an expansion upon the district court's instruction to the jury that "the fact that [others] have been found guilty of ~~those~~ offenses is not evidence that any of these defendants are guilty." Tr. 4489.

The prosecutor's comment was invited because petitioners' counsel expressly accused the Assistant United States Attorneys of suborning perjury. See, *e.g.*, Tr. 4401 (comment by Gambino's counsel). In response to this charge of misconduct by defense counsel, the prosecutor was entitled to argue that Kane was not a perjurer and that Reyers had pleaded guilty based on Kane's testimony against him. See *United States* v. *Robinson*, 485 U.S. 25, 33 (1988) (defendant's attorney argued that government had unfairly deprived his client, who did not testify at trial, of opportunity to explain his actions; Court held that this invited prosecutor's otherwise impermissible response that the defendant had the opportunity to take the stand and testify if he so desired).[9] In par-

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convicted of crimes similar to those charged in the case. The court found that this did not constitute proper impeachment of that witness and was highly prejudicial. *Id.* at 734-735. Here, Reyers' guilty plea was properly introduced, and the prosecutor's rebuttal comment was invited by the defendants.

[9] Gambino contends (91-199 Pet. 36-37) that the response was invited only by counsel for one of his co-defendants. In fact,

ticular, the use of Reyers' guilty plea was proper to answer the defendants' introduction of evidence that Reyers, while still a defendant, had said that Kane was a liar. Reyers' decision to plead guilty to charges that were based largely on Kane's testimony, was tantamount to a retraction of his claim that Kane was a liar who had fabricated his testimony at trial. It was not improper for the prosecutor to refer to Reyers' guilty plea for the limited purpose of answering the defendants' reliance on Reyers' comments regarding Kane's credibility. In sum, the court of appeals' fact-bound determination that the prosecutor's com-

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Gambino's counsel in his own closing statement accused the prosecutors of helping FBI agents to "change [their] testimony to suit the prosecution." Tr. 4396-4397. Gambino's counsel then stated "if an agent can be made to do it, can a felon, an informant, facing life imprisonment, be made to color or change his testimony in a particular fashion, if that's what is needed for the prosecution?" Tr. 4396. Gambino's counsel then argued that one of the prosecutors had coached Kane on a particular point during a lunch break. *Ibid.* Gambino's counsel also stated that Gambino was indicted solely because the prosecutors "didn't have the integrity" (Tr. 4387) to recognize that the government witnesses were unworthy of belief. In light of these comments, the prosecutor's use of Reyers' guilty plea to support Kane's credibility was invited by Gambino as well as by the other petitioners.

ments did not invite the jury to misuse the guilty pleas does not warrant further review in this Court.[10]

4. Tony Mannino et al. contend (91-439 Pet. 14-15) that the government failed to minimize the interception of non-pertinent conversations and to advise the district court of the method that was being used to minimize the interception and use of those conversations.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2521, requires that "[e]very order [authorizing electronic surveillance] * * * shall be conducted in such a way as to minimize the interceptions of communications not otherwise subject to interception under this chapter." 18 U.S.C. 2518(5). That provision balances the individual's privacy interest and the government's interest in investigating criminal activity. See *Scott* v. *United States*, 436 U.S. 128, 130 (1978). Section 2518(5) further provides, however, that simultaneous minimization is not required "[i]n the event the intercepted communication is in a code or foreign language, and an expert in that foreign language or code is not reasonably available during the interception period." In

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[10] Even assuming that the prosecutor should have avoided the reference to the guilty pleas, it was at most harmless error. An improper summation requires reversal only where "the statements, viewed against 'the entire argument before the jury,' *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 242 (1940), deprived the defendant of a fair trial." *United States* v. *Wilkinson*, 754 F.2d 1427, 1435 (2d Cir.), cert. denied, 472 U.S. 1019 (1985). The prosecutor's comments must be found to have "so infected the trial with unfairness to make the resulting conviction a denial of due process." *Darden* v. *Wainwright*, 477 U.S. 168, 181 (1986). Nothing of the sort occurred here. The prosecutor's remark was an isolated event in the day and a half of closing arguments.

such cases, "minimization may be accomplished as soon as practicable after such interception." *Ibid.*

All government personnel monitoring the communications intercepted by electronic surveillance were given oral and written instructions on minimization and were directed to minimize conversations in English. Tr. 13-14. If the monitoring agent intercepted a non-pertinent English-language conversation, he simply deactivated the listening device. Tr. 27. A large number of intercepted conversations, however, were in Sicilian. Most of those conversations were subject to post-interception minimization by FBI Language Specialist Steven Salvo. Salvo would listen to the beginning of the tape of each Sicilian conversation to determine whether it fell within the scope of the authorization. If it did not, he stopped listening and proceeded to the next conversation. Salvo did not listen to non-pertinent conversations. Tr. 19-20, 81, 96. Only conversations that fell within the terms of the surveillance authorizations were translated. C.A. App. 347-348.

Salvo was the government's sole Sicilian language translator on this investigation.[11] Tr. 55. It was not physically possible for him to monitor the several surveillances that were proceeding simultaneously in connection with this case.[12] Tr. 17. Although the

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[11] Salvo received assistance from another translator who prepared rough drafts of conversations. Tr. 33. Other monitoring agents were trained in Italian. Although the Sicilian dialect is distinct from Italian, those agents were often able to discern whether a conversation pertained to criminal activity. Tr. 36-37, 52-53.

[12] Surveillances were conducted at Leo's Pizza Palace in Pittman, New Jersey; Sal's Pizza in Philadelphia, Pennsylvania; the residences of Simone Zito and Tony Mannino in Eagleville, Pennsylvania; and a black Mercedes Benz automo-

government made every effort to hire additional persons fluent in both English and Sicilian, it was unable to locate individuals who were proficient in Sicilian, who were willing to participate in this type of investigation, and who could obtain the requisite security clearance.[13] Tr. 17-18, 46, 48-49; C.A. App. 348-350. For those reasons, the district court properly concluded that the Sicilian-language conversations were in fact minimized "as soon as practicable" and that "the post-interception minimization procedures used by Agent Salvo were thorough, and limited the government's intrusion into [petitioners'] privacy to both a statutor[ily] and constitutionally acceptable degree." C.A. App. 350.[14]

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bile driven by Simone Zito. Tr. 11-13. The surveillance at the Zito residence, the Mannino residence, and the Mercedes automobile proceeded simultaneously, with Agent Salvo spending much of his time monitoring the Mercedes. When he was not monitoring the Mercedes, he was performing post-interception minimization on conversations intercepted at other locations. Tr. 104.

[13] The case agent was keenly aware of instances in which confidential investigations had been compromised by translators. Tr. 18-19.

[14] The district court in *United States* v. *Gambino*, 734 F. Supp. 1084 (S.D.N.Y. 1990), a criminal case involving Joe Gambino, likewise approved of the electronic surveillance procedures used here. In response to the *Gambino* defendants' objection to post-interception minimization, the district court held:

> The government should only be put to the expense and delay of securing simultaneous minimization if the privacy interests of the defendant clearly warrant such protection. The process of post-interception minimization undertaken by Special Agent Salvo provides essentially the same protection of privacy interests as does simultaneous minimization; in each case, only one government agent is privy to all conversations, and only the relevant conversations are translated into English and preserved as potential evi-

Petitioners infer (91-439 Pet. 12) from the large number of non-pertinent communications intercepted that the monitoring agents failed to minimize. Petitioners do not state whether those conversations were in English or Sicilian. Even if the non-pertinent conversations were in English, the interception of those conversations does not indicate that the agents failed to comply with their obligation to minimize. As the Supreme Court explained in *Scott* v. *United States*, 436 U.S. at 140:

> [B]lind reliance on the percentage of nonpertinent calls intercepted is not a sure guide to the correct answer. Such percentages may provide assistance, but there are surely cases, such as the one at bar, where the percentage of nonpertinent calls is relatively high and yet their interception was still reasonable. * * * Many of the nonpertinent calls may have been very short. Others may have been one-time only calls. Still other calls may have been ambiguous in nature or apparently involved guarded or coded language. In all these circumstances agents can hardly be expected to know that the calls are not pertinent prior to their termination.

This was precisely such a case. Many calls were ambiguous and involved coded language, and the investigation concerned "a wide-ranging conspiracy with a large number of participants." *Id.* at 142.

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dence. Given the difficulty and expense of providing for simultaneous translation of Sicilian conversations, and the delay in activating the wiretaps that such a requirement might have caused, the Court finds that the government's minimization efforts are acceptable under Title III and the Fourth Amendment.

Id. at 1106.

Contrary to petitioners' contention (91-439 Pet. 11), each authorizing judge was fully advised that the government would have to perform post-interception minimization in this case, both in the initial application and in each of the 30-day extension requests. *E.g.*, C.A. App. 205-206. Petitioners rely entirely on the government's omission of any mention of post-interception minimization in the seven-day periodic reports. There was no need to discuss post-interception minimization in those reports, however, because the district court was informed in each 30-day request that the government anticipated the need for post-interception minimization.

Finally, petitioners are wrong when they assert (91-439 Pet. 15) that the government "flagrant[ly] and willful[ly]" disregarded their privacy. Agent Salvo did not listen to any conversation that was determined to be non-pertinent. The only additional invasion of privacy occasioned by post-interception minimization (as compared to the pre-interception minimization petitioners advocate), is that tape recordings were made of certain private conversations, which were then not listened to when it was determined that those conversations were subject to minimization. Neither Agent Salvo nor any other representative of the government has listened to any of those recordings, which remain sealed.[15]

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[15] The procedure followed by Agent Salvo was that envisioned by Congress when it authorized post-interception minimization in the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, Tit. I, § 106(c), 100 Stat. 1856. See S. Rep. No. 541, 99th Cong., 2d Sess. 30 (1986) ("it is contemplated that the translator or decoder will listen to the tapes of an interception and make available to the investigators the minimized portions preserving the rest for possible court perusal later").

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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